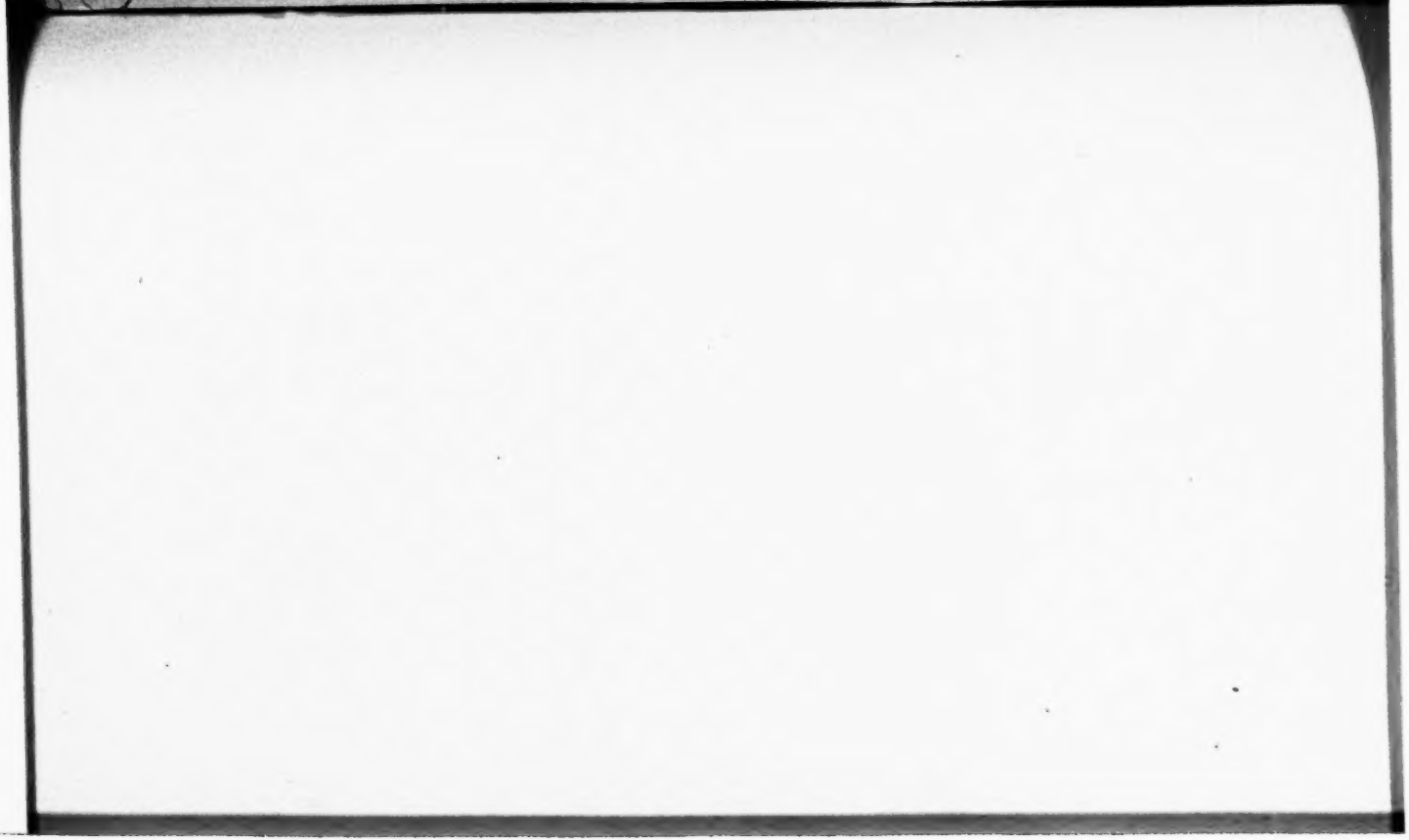

No. 180.

Br. of Schoyer & Carter for Resp.

Filed Nov. 12, 1900.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

FARMERS' LOAN AND TRUST COMPANY,

VERSUS.

PENN. PLATE GLASS COMPANY, et al.

In the Matter of the Application of the Farmers' Loan and Trust Company, for a Writ of Certiorari, to the Circuit Court of Appeals for the Third District.

BRIEF FOR THE PENN PLATE GLASS COMPANY, IN OPPOSITION TO THE ISSUE OF THE WRIT.

S. SCHOYER, JR.,
BERNARD CARTER,
S. B. SCHOYER,
Solicitors for Penn. Plate Glass Company.

IN THE

SUPREME COURT OF THE UNITED STATES.

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A.

The object of this writ asked for, is to bring into this Court for review, the Decree of the Circuit Court of Appeals for the Third District, which reversed a decree of the Circuit Court of the United States for the Western District of Pennsylvania,

passed in a cause brought into that Court, by a Bill in Equity filed therein by the Farmer's Loan and Trust Company, a citizen of the State of New York, against the Pennsylvania Plate Glass Company, William L. Kann, and the Penn Plate Glass Company, all citizens of the State of Pennsylvania. The jurisdiction of the Circuit Court for the Western District of Pennsylvania was dependent, (using the language of section 6 of the Acts of March 3, 1891, 26 Stat. 826, 827., Ch. 517, establishing the Circuit Court of Appeal) entirely upon the opposite parties to the suit or controversy, being citizens of different States; and the decree therefore, of said Circuit Court of Appeals for the 3d District is by said Act, made final in the said case, subject to the right of this, the Supreme Court of the United States, to require the said Decree to be certified to it for review and determination.

B.

This Court has established for its guidance, the principles upon which it acts in disposing of applications made to it for the exercise of the power thus granted, and has thus stated them; that while the power is co-extensive with all possible neccesities, and sufficient to secure to this Court a final control over the litigation in all the Circuit Courts of Appeals, it is a power *to be exercised sparingly, and with great caution.*

Its exercise will be confined to those cases, where its exercise is demanded;

1. For the purpose of avoiding conflict between two or more Circuit Courts of Appeals, or between such Courts of Appeal, and the Courts of a State.

2. In cases involving matters affecting the interests in the United States, its internal or external relations, or, in cases involving other matters of "*pe-*

culiar gravity and general importance."

141 U. S. 507, Lau Ow Bew.
143 U. S. 205, 206, *in re* Woods.
148 U. S. 383, Am. C. Co. vs. Jacksonville R. Y.
166 U. S. 514, Forsyth vs. Hammond.

C.

As there can be no claim that the present case comes under either of the first two of the above classes, if the Court grants the writ asked for, it must be because the decision of the case by the Circuit Court of Appeals for the Third Circuit depended upon the determination of some question of "*peculiar gravity and general importance.*"

While of course this Court has not laid down, and could not well lay down, any exact rule for ascertaining whether any particular question comes within the description of questions of "peculiar gravity and general importance," yet we respectfully submit that an examination of the Record and the opinion of the Circuit Court of Appeals will show that there is no reasonable ground for claiming that the decree of that Court rested upon the determination of any question which comes within the class intended by this Court to be described as questions of "peculiar gravity and general importance."

D.

Before proceeding to make good this proposition, we call attention to the fact that the petition of the applicant for the writ, as well as the brief in support of it, seems to put in the fore front of the reasons why the writ should be granted, the fact that the district judge who decided the case in the Circuit Court, and one of the Circuit judges who sat in the Circuit Court of Appeals, did not agree with the conclusions

reached by the majority of the judges who sat in the Circuit Court of Appeals.

We respectfully submit that this is an altogether immaterial matter, and that, under the decisions of this Court above referred to announcing the principles which will guide it in granting or refusing writs of *certiorari*, the fate of an application for the writ will depend *on the character of the questions decided*, and not on the unanimity of the judges who sat in the case in which they were decided. Otherwise, instead of this Court exercising the jurisdiction in question "*sparingly*," it would be very constantly exercising it.

E.

We understand of course that this Brief is no place in which to show the *correctness of the conclusions reached* by the Court of Appeals, nor to answer the objections made to them in the dissenting opinion; *the only thing we have a right to do* on this application, is to exhibit to this Court, the *nature of the questions* involved, and of the determination of these questions, in order to show that they are not of that character as will warrant the exercise by this Court of its jurisdiction by way of *certiorari*.

The counsel for the petitioner, in addition to the effort made in this petition and the Brief filed in support of it, to show that the case was wrongly decided, file the Brief upon which the case was submitted to the Circuit Court of Appeals.

If it were necessary, (which it is not) to add anything to the answer to these arguments which the opinion of the Circuit Court of Appeals contains, this, as we have said, is not the proper place to do so.

The Record is voluminous, but as the opinion of the Circuit Court of Appeals states with fullness and accuracy the facts out of which the questions determined arise, it will place this

Court in full possession of the case for the purpose of disposing of this motion.

This opinion will be found in 103 Fed. Rep. p. 144 et seq.

F.

Before proceeding to explain to the Court the questions raised for the determination of the Court, and determined by it, let us state *in brief outline*, what it is that the petitioner, The Farmers' Loan and Trust Company, the complainant, sought to do in the Courts below, and because it was balked in its effort by the Decree of the Circuit Court of Appeals, seeks the aid of this Court.

(*a*) A plate glass company in the western part of Pennsylvania, called the Pennsylvania Plate Glass Company, in 1891, issued $250,000 of bonds, and secured their payment by a mortagage of its works to the complainant. In this mortgage there was an article relating to the duties of the trustees, and by virtue of its provisions, the trustee claimed the mortgagor company obligated itself, upon the requirement of the trustee, to insure the improvements on the mortgaged property for the benefit of the morgagee.

(*b.*) The mortgagor becoming insolvent in the year 1894, a receiver was appointed by a Court of competent jurisdiction in Pennsylvania, and by order of that Court the mortgaged glass works were sold by the receiver, subject to the lien of the mortgage, to W. L. Kann, and conveyed to him, subject to said mortgage, by deed dated July 1, 1894. He held the property for a year putting improvements upon it, and then in July 1895, conveyed it to a new plate glass company, he and others organized for carrying on the business, called the Penn. Plate Glass Company, the property being conveyed, as he had purchased it, subject to the said mortgage.

(*c.*) In the year 1894, after the property had been purchased by Kann, he insured it for $450,000, a large number

(some 95) companies joining in taking the insurance.

In each of these policies, there was inserted by the insurance Companies, by the direction of Kann, this clause. "*This property is subject to a mortgage for $250,000, but it is distinctly understood that this insurance does not cover the interest of the bond holders.*"

(*d.*) At or about the time in 1894, when Kann purchased and insured the property in the manner above set forth, the said Mortgagee Trust Company notified Kann to insure it for the benefit of the bondholders, and in reply Kann notified it in writing that he refused so to insure said property, and that the existing and all future insurance was and would *be for his own benefit alone, and not for that of the bondholders.*

(*e.*) When the property was conveyed to the Penn Plate Glass Company, in July 1895, it continued in its name the same insurance which Kann had carried, and in each of the 95 policies there was inserted the *same clause as that above quoted from the policies Kann took out.* After the purchase by said company of said property, it received in the year 1895, from the mortgagee trustee, a notice requiring it to insure it for the benefit of the mortgage bondholders. To this notice, the answer was made in writing that the insurance effected by it, was and all future insurance would be only for its own benefit alone, and not for that of the bondholders.

(*b*) The coupons on the mortgage bonds falling due July, 1895 not having been paid, the trustee, under a provision of the mortgage, prior to July, 1st, 1896, declared the whole mortgage debt due, and on that day filed its bill for a foreclosure of the mortgage. At the time the bill was filed, there was no insurance on the property for the benefit of the mortgagee or the bondholders, (unless that taken out by the Penn. Plate Glass Company should be so held,) and no such insurance had been taken out in the interval between the time of Kann's purchase in July, 1894, and the time of said bill filed in July, 1896;

and the trustee and the bondholders had during all these two years refused to take out any insurance on the mortgage interest, notwithstanding the notices given by Kann (during his ownership) and by the Penn. Plate Glass Company, above-mentioned.

G.

About the time of filing this original bill, namely, in July 16th, 1896, the plaintiff made a motion for the appointment of a Receiver of the mortgaged premises. This was, after argument, refused; but after the Court had announced its decision, counsel for complainant mentioned the fact that there was no insurance on the property for the benefit of the bondholders, and that they would be unprotected in case of a loss by fire, and that the Farmers' Loan and Trust Company was a trustee without funds, and that his clients were entitled to insurance. *Thereupon counsel for defendants expressly denied that either the Penn. Company or Kann was bound to* insure for the benefit of bondholders, either by virtue of anything contained in the mortgage, or the terms of their purchase. Counsel for complainant said they were entitled to insurance, whereupon the Court said: "I can't decide that question," and intimated to defendants that if they were bound to insure they ought to protect the complainant; they denied still that they were bound to insure, but W. L. Kann and Emannuel Wertheimer, (who were stockholders in the Penn Company), agreed to give their *individual* bond or agreement, conditioned that out of the *then* existing policies of insurance which had been previously taken out by the Penn Company, there should be paid an amount sufficient to protect the amount of valid bonds.

Provided, That it shall have been finally adjudicated that the Penn Plate Glass Company, the present owner of the said property, is bound or liable by anything contained in the said mortgage, or the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage, and without pre-

judice to the right of the Penn Plate Glass Company, its successors and assigns, to deny its liability to take out, keep and maintain polices of insurance on the said plant, at any time for the benefit of holders of valid bonds secured by the said mortgage, or for the trustee of said mortgage.

(*h.*) Having taken this bond, accompanied, as above stated with the express denial by the Penn Plate Glass Company, that it was in any way bound to insure for the trustee or the bondholders, and with the above mentioned notice that it would not so insure still in force, neither the trustee nor the bondholders ever thereafter took out any insurance to protect said mortgage interest.

In April 1898, nearly two years after the bill filed, (while the litigation begun by said Bill of Complaint filed in July, 1896 was still pending,) a fire took place which substantially destroyed the Glass works.

(*i.*) At the time of this fire the above mentioned policies taken out by the Penn Plate Glass Company, *exclusively for the protection of its own interest*, were in force, and the 95 insurance companies stood ready to pay the amount of the loss.

The trustee by its supplemental bill in the Circuit Court for the Western District of Pennsylvania, claimed a lien upon this money, for the payment of the mortgage bonds, to the extent of any deficiency in the proceeds of the sale of the mortgaged property.

The said Court appointed one of the directors of the Penn Company receiver, to receive the money, and subsequently, by its decree directed the receiver to hold $125,000 of this fund for the benefit of 90 of said bonds secured by the mortgage, in case it should be decided that the trustee of the bondholders had an equitable lien on the money, (the remaining 160 bonds being owned by said director, who stipulated that the same should not participate in the insurance money.)

(*j.*) It will be seen from the foregoing that for more than three years and a half, (from some time shortly after July, 1894 up to April 1898,) the mortgage trustee and the bondholders, *persistently* refused to take out any insurance to protect the mortgage interest, though notified by the owners of the equity of redemption, that they denied any duty or obligation to protect said interest, and *would not do so.*

That is to say, the trustee and bondholders, claiming as matter of law there was a legal obligation on the part of the owner of the Equity of Redemption to protect the mortgage interest by insurance, perversely and obstinately chose, in the face of the repeated and long continued denial by the equitable owner of any such duty and obligation, to run the risk of the legal point being decided against them, and if it was so decided, and a fire occurred in the meantime, to have *no insurance on their interest.*

And the fire having so occurred, and the Circuit Court of Appeals having decided that said trustee was wrong in its, claims as to the relative rights and obligations of the parties, the Supreme Court of the United States, is asked to exercise its exceptional jurisdiction to review that determination.

Surely there is an *entire absence of any equitable grounds* for asking the Court to take this action it is asked to take. As an excuse for not taking out insurance itself,

The trustee, through its counsel, when the Circuit Court refused to grant a receiver, said it was a trustee without funds, but at the very time whenthis was said, the trustee had filed the bill for foreclosure.

Before filing it, those declaring themselves to be holders of one-third in value of the bonds presented the following to the trustee.

"January , 1896.

To the Farmers' Loan and Trust Company:

Default has been made by The Pennsylvania Plate Glass Company on the first day of July, 1895, in the payment of the interest on the bonds secured by the mortgage of that Company to your Company as Trustee, dated January 1st, 1891. Such default has continued for six months after demand made in writing by the Trustee for the payment of such interest. The undersigned, holders of one-third in value of the bonds secured by said mortgage and then outstanding, hereby make and deliver to you their written requisition that you commence and prosecute such action, suits or proceedings, at law or in equity, as shall be necessary to obtain a sale of the mortgaged premises, by and under judicial authority, and to bar and forclose the equity of redemption of the mortgagor Company, its successors and assigns, and of all persons claiming under them. *And the undersigned hereby agree to indemnify and save you harmless from all expenses, costs, outlays, counsel fees or other disbursements which you may incur or become liable for by reason of anything that you may do in carrying out this requisition:* (Record, Vol. 1, page 93.)

There can be no doubt that insurance of the property would have been a proper "*outlay*" in connection with the proceedings for the foreclosure.

But altogether independent of this stipulation, the trustee as soon as the equitable owner, in 1894, denied its obligation to insure, it was the duty of the trustee to notify the bondholders, and request them to put it in funds to take out proper insurance.

And without such notification, or any action of the bondholders, the trustee could have insured the property, and the cost of insurance would have been a lien on the property in its hands, because by Section 10, (Rec. vol. 1, p 35) of the mortgage the trustee, with or without indemnity from the bond-

holders, is authorized "to do anything which in its judgment is proper to be done by it as trustee, and *in such case it shall be compensated therefore from the trust fund.*" And by the same section (vol. 1, p 35, bottom of page) *it is expressly authorized to effect insurance against fire or other damage to any portion of the mortgaged property.*

The *trustee is therefore absolutely without excuse, on the score of want of funds, in omiting to insure.*

Another ground sought to be set up for its failure to insure, and for its being allowed to have a lien on the insurance money received from the policies taken out by the Penn Plate Glass Company, is thus stated on page 6 of the petition.

"The Property being insured to an amount equal to its entire value, and being mortgaged for $250,000, is destroyed by fire, and in its stead remains its entire value in insurance money. The petitioner claims that it is entitled to a decree, such as was rendered by the trial Court below, to the effect that any deficiency that might be found after the sale of what little is left of the mortgaged property, should be paid out of the insurance funds.

If the decision of the Court of Appeals stands unreversed, the Penn Plate Glass Company will profit to a very large extent at the expense of the bondholders by reason of this fire, which will be to them a most fortunate catastrophe. Kann bought the property for $37,500, expended, as he claims, money upon it to increase its cost to him to not more than $83,500, at which last figure the conveyance was made to the Penn Company. Subsequently the Penn Company made improvements, so that the cost to it amounted to $118,000 (Record, vol. 1, p. 483). This property the Penn Company insured for some $450,000, and it proposes to collect the insurance without paying the bonds."

I.

The facts upon this subject ars as follows :

Though this property had cost the mortgagor about $300,000, yet when it went into the hands of the receiver, and was sold, it brought but $37,500. At that time by reason of the want of proper appliances for supplying it with water, fuel, ect., it had little value as an operative plant, (Test. of Kann, Rec. 479, 484.) Subsequently to the purchase by Kann, these defects were supplied, additional land purchased, and the plant put in good order. (Rec. 175.) The total cost of the expenditures made after the purchase including those made by the Penn Plate Glass Co., after its purchase by Kann, was about $200,000. (Rec. 176).

Here, therefore, we have a manufacturing establishment, the cost alone of the ground and plant of which was $500,000. But when it was destroyed it was a *going concern*, its value to its owners was in no way limited to its mere cost ; nor was the loss which would be caused to such owner by the entire practical destruction of such a manufacturing plant as a going concern be inany way measured by the mere *cost* of the plant and buildings.

But we are not dependent for answer to the assertion of the petition that the amount of insurance held by the Penn Plate Glass Company was equal to the *entire value* of the property.

For the ninety-five fire insurance companies whose policies were held by the Penn Plate Glass Company at the time *of the* fire, *contradict this assertion.* For, as above shown, in each one of these policies there was inserted this clause : "*This property is subject to a mortgage of $250,000, but it is distinctly understood that this insurance does not cover the interest of the bondholders.*"

Now, as it was only the equitable interest, and not the mortgagee's interest which was insured, it follows that when

each of these companies insured this interest, it was an assertion by them that there was insurable value to the extent of $450,000 in the property over and above the mortgage debt.

There can be no possible doubt that if the trustee had applied to insurance companies for an insurance on the property to the extent of his mortgage interest, which was the first lien on the property, insurance would have been readily granted. If the Penn Plate Glass Company could secure insurance on its interest subject to the mortgage, for $450,000, the trustee could, merely by asking for it, have secured insurance for his $250,000.

3. But even if it were otherwise this Court has decided it to be settled law that an owner of an equitable interest has a clear right to insure the property to its full insurable value, although there may be a mortgage on it equal to its value.

Stinson vs. The Ins. Co., 103 U. S., page 25.

The next ground mentioned in the petition in support of the application for the writ of *certorari*, is to be found on pages 4 to 6, that is to say, that the trustee asked for and was refused a receivership of the property in July 1896, and that the claim to the right to foreclose was kept in litigation till after the fire in April 1898. In reply to this remarkable position, we respectfully refer this Court, to what is said by the Circuit Court of Appeals, in its opinion, (103 Federal Reporter, page 159,); that Court fully considering this claim, in connection with all the facts connected with the acts of the parties connected with the taking out by one, and the failure to take out by the other, of insurance, justly reaches the conclusion, that this contention is "*frivilous.*"

And as we have already shown, the leaving of the Penn Plate Glass Company in possession, in no way interfered with the full and free exercise of the opportunity to the trustee to insure, and for the charge for the insurance, it would have a *first*

lien on the *property*, and the insurance money in case it was damaged by fire.

We wish also to call attention to another statement of the petitioner in its brief (page 3) filed in support of the petition.

After claiming that the fact that the Circuit Court of Appeals ordered a re-argument of the case, shows its "*gravity and importance*" (certainly a most *novel* and remarkable contention) it is said: "To this contention may be added the fact that the bondholders are practically without remedy, and their security almost entirely gone, unless the insurance monies can be applied, as their application as ordered by the decree of the Circuit Court."

In the first place we say in reply that *there is nothing in the record to support this statement*, that unless they are paid out of the insurance money their security is "almost *entirely* gone." For although the works as a *going concern* were substantially destroyed, it does not appear what the real estate and other property not destroyed is worth. And we feel justified in saying that [redacted] $70,000 may be realized from the remaining mortgaged property.

And (2) we further respectfully submit, that even if the bondholders were practically without remedy, "and their security almost if not entirely gone," unless the insurance monies in question can be applied to the payment of said bonds, this is a result, (for the reasons we have heretofore stated,) for which these bondholders have no one to blame except themselves and their trustee. And for a full statement of the facts in support of this assertion, and of what we have said, we respectfully refer to the opinion of the Circuit Court of Appeals. (103 Fed. Rep., 144 to 145, and 157 to 161.)

Having thus shown that there is nothing in the respective attitudes and action of the respective parties to *induce this*

Court to make an effort to find ground for exercising the "sparingly exercised" jurisdiction by *certiorari*, we now proceed to explain the questions determined by the Circuit Court of Appeals, and respectfully to claim that there is no ground for any reasonable contention that they can be considered "questions of gravity and general importance," within the meaning of those words as used by this Court.

I.

First question determined by the Circuit Court of Appeals.

From the foregoing statement it appears that as the Penn. Plate Glass Company became assignee of the mortgaged property, subsequent to the lien of the mortgage, and bore no other relation to it, or to the mortgagee, except that which such an assignment created, and as it is not pretended that the Penn Company ever other-wise covenanted or promised directly or indirectly to insure for the benefit of the trustee or bond holders; and as the insurance money claimed by the mortgagee was the proceeds of insurance effected by said assignee on its own sole and exclusive interest in the property,

the only possible claim which the mortgagee could have upon this money must rest for its *basic proposition* upon a covenant in the mortgage on the part of the mortgagor with the mortgagee to insure for the benefit of the mortgagee.

When such basic proposition is maintained, then the mortgagee must go further and show a transfer, in some way, of this obligation to the assignee of the mortgagor.

But the basic proposition must first be maintained. This is a well established and perfectly familiar principle of jurisprudence.

10 Peters 507, Ins. Co. vs. Lawrence.
101 U. S. 442, Wheeler vs. Ins. Co.

2. Accordingly the trustee mortgagee claimed and endeavored to maintain that the mortgage deed of January 1, 1891, does *contain* such a covenant—unless it succeeded in this contention, each and every other contention on its part (whether well or ill founded, when the contention we now speak of is maintained) *necessarily fell to the ground.*

The successs or failure to maintain this basic proposition, depended upon the proper interpretation of a *particular and peculiar provision* of this *particular* mortgage, the nature of which is fully set forth in the opinion of the Circuit Court of Appeals, and should not therefore be herein dwelt upon.

Now the Circuit Court of Appeals reached the conclusion that upon the true and proper construction of the particular and peculiar provision of this particular mortgage it contained no covenant on the part of the mortgagor to insure for the benefit of the mortgagee.

And further determined, as was the inevitable result, that such being the true interpretation and construction of this mortgage, the whole foundation on which any possible claim to the insurance money must rest, was up-rooted, no matter whether the other contentions of the mortgagee would or would not be teneble, if this basic proposition had been maintained.

Having so decided, the Court said it did not wish to rest its determination of the case upon this ground *alone*, and proceeded, (assuming *ex gratia argumenti* that the mortgage *did* contain a covenant on the part of the mortgagor to insure for the benefit of the mortgagee), to decree upon the other contention of the mortgagee, and to decide then adversely to him.

Certainly it would not comport with the proper respect for this Court for us to act upon the assumption that any argument is needed to show that the construction of a particular

and peculiar provision in a particular mortgage is the disposition of a question of peculiar gravity, or of general importance.

II.

Second Question decided by the Circuit Court of Appeals.

Assuming now, *ex gratia argumenti* that the mortgage contains a convenant on the part of the mortgagor to insure for the benefit of the mortgagee, did the Penn Plate Glass Company by merely becoming the grantee of the Equity of redemption, subject to the lien of the mortgage, thereby (1) come under *a direct* obligation to the mortgagee to insure for its benefit; or did said Company, by said assignment (2) come under such an obligation to indemnify the mortgagor against the obligation of the latter to insure, as is available to the mortgagee. The Court takes up these first and second questians and decides each of them.

As to (1) —

The Court refers to the well established doctrine recognized and restated by this Court in the case of Wheeler vs. Insurance Company, 101 U. S. 439, that if the mortgagor is bound by convenant or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien on the money due on a policy taken out by the mortgagor, to the extent of the mortgagee's interest in the property destroyed even although the policy is taken out in the name of the mortgagor, and that the Court will follow this fund into the hands, whether of the mortgagor or his heirs, &c., or the Insurance Company, or into the hands of voluntary assignees of said funds; *but that this result*, as this Court in the case quoted declares, grows out of the contract so made between the mortgagor and mortgagee.

The Court then preceeds to show that this well known doctrine, in no way entitles the trustee mortgage in the present case, to a lien on the proceeds of the Insurance taken out by the Penn Plate Glass Company, because (1) no direct contract was ever entered into between it and the said mortgagee; and, (2) because in the absence of such contract, conveyance of the property to the Penn Plate Glass Company subject to the lien of the mortgage, imposed no obligation on the Penn Plate Glass Company in respect of the convenant to insure, which was a convenant personal to the mortgagor, (a doctrine fully recognized by this Court in 10 Peters, 507, Insurance Company vs. Laurence,) and had been decided to be, and was conceded by counsel for the trustee to be, one not running with the land.

The doctrines thus stated is what have been theretofore decided.

1st. Jones on Mortgages.
Dunlap vs. Avery, 89 N. Y. 597-598.
Reed vs. Mr. Cruner, 91 N. Y. 412.

(2.) The Court then proceeded to decide the question whether the Penn Plate Glass Company, by taking an assignment of the mortgaged property subject to the lien of the mortgage, comes under such an obligation to the mortgagor to *indemnify* it in respect of the contract of the latter to insure, as can be availed of by the mortgagee.

As to this question, the Court holds, that though taking property subject to the lien of a mortgage may be held, as it has been in Pennsylvania, to be equivalent to a contract with the mortgagor on the part of the assignee, to *indemnify* him in respect of said debt, it has been so held only *because* the Courts *had* construed such a transaction as equivalent to an agreement on the part of the assignee with the mortgagor to leave so much of the purchase money as is represented by the mortgage in the hands of the assignee, and

it would be a fraud on his part if he did not pay it to the mortgagee, and thus compel the mortgagor to pay it; but that an implied contract to indemnify the mortgagor in respect of the *mortgage debt* for the reasons so stated, is the full extent of the implication of the contract, from taking the property subject to a mortgage; and that there is no implication of a contract to indemnify the mortgagee in respect of any of the covenants of the mortgagor.

And that moreover it was the doctrine established in Pennsylvania by the decisions of its Supreme Court, that the only obligation in respect to the mortgage debt incurred by the purchaser to the vendor, when the property is conveyed subject to the mortgage, is an obligation to *indemnify* the mortgagor in respect of said debt, and, therefore, if the mortgagor is under no personal responsibility to the mortgagee in respect of the mortgage debt, no obligation arives on the part of the purchaser in respect thereto. 133 U.S. 625

The Circuit Court of Appeals then, again construing this particular mortgage, found that by its terms the mortgagor was expressly exempted from all responsibility in respect of the mortgage debt.

That even therefore if, as had been held in the Circuit Court, the contract to insure was an incident and adjunct to the mortgage debt, and whenever the obligation to indemnify the mortgagor in respect of this mortgage debt was transferred to the assignee the obligation to indemnify him in respect of the covenant to insure was also transferred, there was no transfer here of any such obligation, because there never was any obligation to indemnify in respect of the mortgage debt itself.

H.

Asking this Court now to look back to the summary we have given of the questions determined by the Circuit Court

of Appeals, we respectfully ask how it can with any show of reason, be claimed that the matters so determined are matters of *peculiar* gravity and general importance within the meaning of these words as used by this Court?

Except so far as the interpretation of a part of the provisions of this particular mortgage is involved, do the questions decided belong to any other class of questions than to the class of ordinary questions which arise out of the relation between mortgagors and their assigns and mortgagees which have been the subject of decisions of courts and examination of text writers, time out of mind? If they belong to that class of questions the determination of which this Court will review in its sparingly exercised jurisdiction by way of *certiorari*, may we most respectfully ask, to what class of questions will not this Court hereafter be asked to extend its jurisdiction?

Third and Last Question Determined by the Circuit Court of Appeals.

The Alleged Equity of the Trust Company to the Insurance Money.

The Circuit Court of Appeals considered and determined these matters in the concluding part of its opinion (103 Fed, Rep. 157 to 161), beginning with the paragraph: "We come now to consider the complainant's last claim, which is that the SPECIAL CIRCUMSTANCES AND FACTS OF THE CASE, as disclosed in the Record, are such as would make it inequitable for the defendants to deny the relief sought, and that, therefore, the Court should impress a lien in its favor upon the funds which it claims are now in Court, and subject to the Court's disposition."

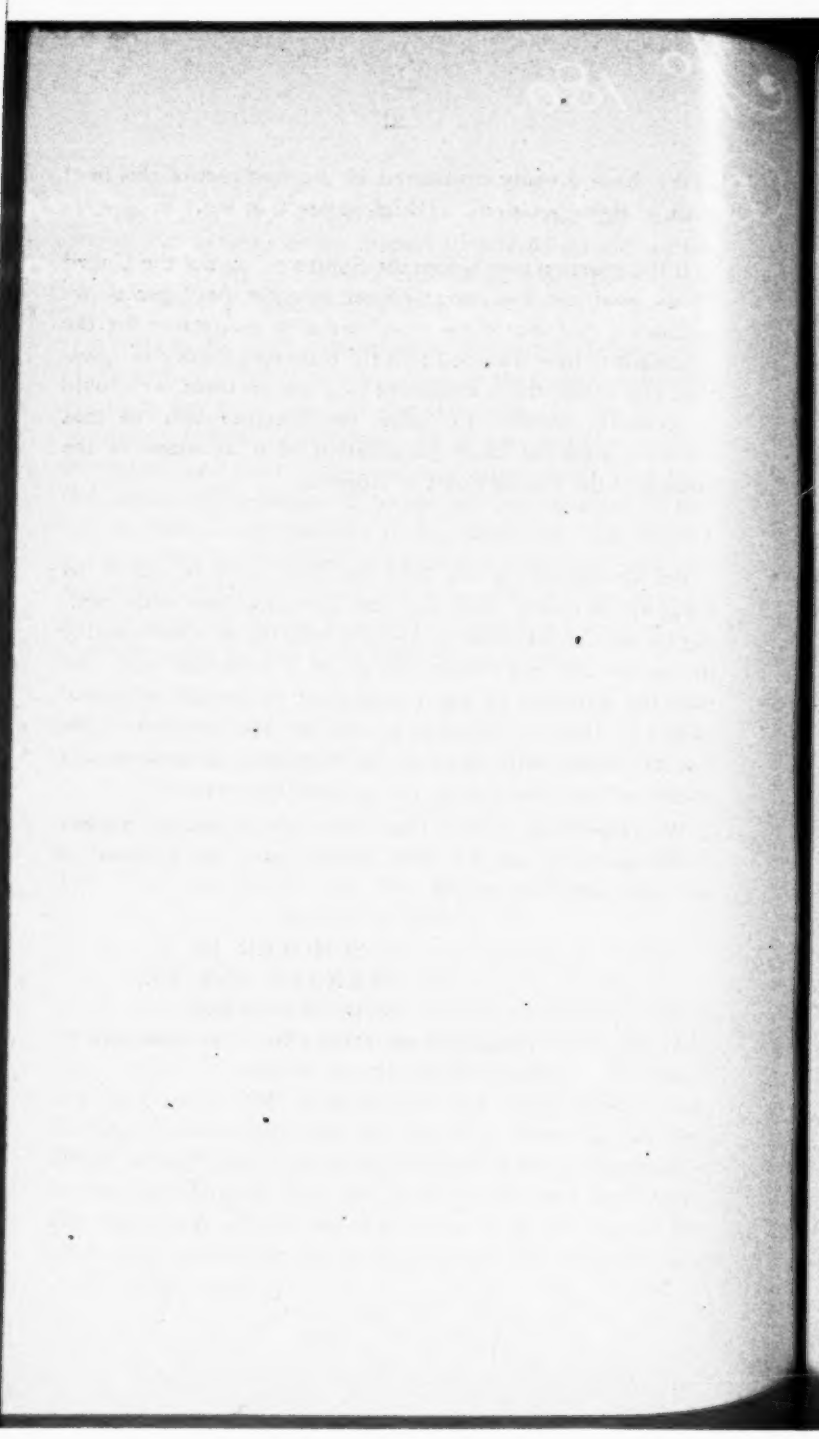
We have already considered in the first part of this brief most of these questions. (Brief, pages 5, et seq.)

If the question now before the Supreme Court of the United States, wasf, *which of course it is not*, whether the "*special circumstances and facts of the case*," make it inequitable for the defendant to have awarded to it the insurance money in question, and entitle the complainant to a lien on them, we should be perfectly content to leave the determination of that question, upon the clear presentation of it as made in the opinion of the Circuit Court of Appeals.

But we respectfully ask, how can this Court be asked, to bring up for review, upon *certiorari*, the correctness of the dealing by the Circuit Court of Appeals, with the question whether the *special facts and circumstances* "*of a particular case*, entitles the defendant or the complainant to certain insurance money? How is it possible to consider the question of the Courts dealing with these *special facts and circumstances*, a matter of "peculiar gravity and general importance?"

We respectfully submit that there can be but one answer to this question, and that such answer must be a denial of any such action on its part.

S. SCHOYER, JR.,
BERNARD CARTER,
S. B. SCHOYER,
Solicitors for Penn. Plate Glass Company.



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JAMES H. McKENNEY,
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Brf. of Schoyer, Carter & Scho
For Respondee
Filed Apr. 11, 1902.

IN THE

Supreme Court of the United States

FOR THE DISTRICT.

October Term, 1900.

FARMERS' LOAN & TRUST CO. *Plaintiff and Appellent,*

VS.

PENN PLATE GLASS CO. ET AL. *Defendents and Appellees.*

Brief for the Penn Plate Glass Co.

APPELLEE.

S. SCHOYER, JR.,
BERNARD CARTER,
S. B. SCHOYER,
For Appellees.

PITTSBURG:
JACKSON PRINTING CO., 341 SECOND AVENUE.
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Brief for the Penn Plate Glass Co.

APPELLEE.

THE FACTS.

Before proceeding to explain to the Court the questions raised for the determination of the Court, let us state *in brief outline* what the facts of this case are:

First. The Pennsylvania Plate Glass Company (hereinafter called the mortgagor Company) made a

mortgage deed of trust dated January 1, 1891, upon its plant and property to the appellant to secure the payment of $250,000 of its bonds.

Second. The Company having subsequently become insolvent, a Receiver was appointed, by whom the mortgaged property was sold to W. L. Kann, and a deed for it, dated July 2, 1894, made to him by the Receiver. In pursuance of the order of sale, the property was sold *subject to the lien of the said mortgage,* and conveyed to W. L. Kann, *subject to said mortgage.*

Third. Kann held the property until July 1, 1895; on that date he conveyed it to the Penn Plate Glass Company, Defendant, *subject to the said mortgage;* which company remained the owner of it until and on April 12, 1898, when the largest part of the buildings and plant were destroyed by fire.

Fourth. The coupons on the mortgage bonds falling due July, 1895, not having been paid, the trustee, complainant, (under a provision of the mortgage), prior to July 1, 1896, declared the whole mortgage debt due, and on that day filed its bill for a foreclosure of the mortgage.

Fifth. When Kann became the purchaser of the property at judicial sale in 1894 he made contracts of insurance in the aggregate of $450,000, covering only his interest in the mortgaged property and expressly excluding the interest of the bondholders by the following clause contained in all the policies:

"This property is subject to a mortgage of $250,000, 'but it is distinctly understood that this insurance does 'not cover the interest of the bondholders."

Sixth. When the Penn Plate Glass Company purchased the property in July, 1895, it also effected insurances to the same aggregate amount, each of said policies excluding the interest of the bondholders in the phraseology quoted in the last paragraph. Policies were taken in ninety-five companies.

Seventh. While Kann owned the property (from July, 1894, to July, 1895), the mortgagee trustee demanded of him insurance for the benefit of the mortgagee, and thereupon he denied his obligation so to insure, and informed the trustee that he had not so insured, and would not so insure; and the trustee knew he had not so insured while he held the property.

Eighth. Upon the purchase by the Penn Company similar demands and similar refusals were made; and the trustee knew when he filed the bill for foreclosure in July, 1896, that the Penn Company had not insured for the benefit of the mortgagee.

Ninth. About the time of filing the original bill,—namely, July 16, 1896,—the plaintiff made a motion for the appointment of a receiver for the mortgaged premises. This was, after argument, refused.

But, after the Court had announced its decision, counsel for complainant mentioned the fact that there

was no insurance on the property for the benefit of the bondholders and that they would be unprotected in case of loss by fire, and that the complainant, trustee, was a trustee without funds, and that his clients were entitled to insurance. *Thereupon counsel for the Defendants expressly denied that either the Penn Company or Kann* was bound to insure for the benefit of bond holders, either by virtue of anything contained in the mortgage, or the terms of their purchase. Counsel for complainant said they were entitled to insurance; whereupon the Court said: "I can't decide that question"; and intimated to the defendants that if they were bound to insure they ought to protect the complainant. They denied still that they were bound to insure, but W. L. Kann and Emanuel Wertheimer (who were stockholders in the Penn Company), agreed to give their *individual* bond, conditioned that out of the *then* existing policies of insurance which had been previously taken out by the Penn Company, there should be paid an amount to protect the amount of valid bonds

"Provided that it shall have been finally adjudicated that the Penn Plate Glass Company, the present owner of the said property, is bound or liable by anything contained in the said mortgage, or the the terms of its purchase of the described mortgaged premises, to keep and maintain insurance for the benefit of the holders of bonds secured by the said mortgage * * * * without prejudice to the right of the Penn Plate Glass Company, its successors and assigns, to deny its liability to take out, keep and maintain policies of insurance on the said plant at any time for the benefit of holders of valid bonds secured by the said mortgage or by the trustee of the said mortgage."

Tenth. On the 12th of April, 1898, nearly two years after the original bill was filed and while the litigation begun by said bill of complaint in July, 1896, was still pending, a fire took place which substantially destroyed the glass works.

Eleventh. For more than three years and a half—from about July, 1894, until April, 1898,—the mortgagee trustee and the bondholders persistently refused to take out any insurance to protect the mortgagee interest, although notified by the owners of the equity of redemption that they denied any duty or obligation to protect said interest and would *not do so;* and consequently at the time of the fire the complainant mortgagee and trustee had no insurance for the protection of the trustee or of the bondholders of said mortgage.

Twelfth. Thereupon the supplemental bill was filed, by which the complainant, mortgagee, claimed a lien upon the said insurance money of the Penn Company, for the payment of the mortgage bonds to the extent of any deficiency in the proceeds of the sale of the mortgaged property; and the Court appointed Emanual Wertheimer receiver to receive the insurance money; subsequently, by its decree, it directed the receiver to hold $125.000 of this money for the benefit of ninety of said bonds secured by the mortgage in case it should be decided that the trustee of the bondholders had an equitable lien on the money, (the remaining one hundred and sixty bonds being owned by the said receiver, who stipulated that the same should not participate in the insurance money).

Thirteenth. In the mortgage or deed of trust, the only provision with reference to insurance is that contained in the following clause: [Article Tenth, Record page].

"It shall be no part of the duty of the party of the second part to file or record this indenture of mortgage or conveyance of real estate or of the chattel mortgage or to renew such mortgage, or to procure any further, other, or additional instrument of further insurance or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof, or of giving notice of the existence of such lien, or for extending or supplementing the same, nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payment to be made but the trustee may, in its discretion, do any or all of the matters and things in this paragraph set forth *or require the same to be done.* **It shall only be responsible for reasonable diligence in the performance of the trust, and shall not be answerable in any case for the act or default of any agent, attorney or employee selected with reasonable discretion."**

Fourteenth. The Court below entered a final decree overruling the defenses to the foreclosure of the mortgage, inter alia, and finding that the trustee was entitled to an equitable lien on the said insurance money, and to that decree an appeal was taken by the defendants to the Circuit Court of Appeals of the United States, by which tribunal the decree of the lower Court was reversed.

And from the decree of the Court of Appeals this appeal has been allowed.

QUESTIONS DECIDED BY THE COURT OF APPEALS.

First. There was not under the terms of the mortgage, an obligation upon the mortgagor arising from express covenant or otherwise, to insure and keep insured, the mortgaged premises for the benefit of the mortgagee.

Second. Even if there was such obligation upon the mortgagor, the Penn Plate Glass Co., becoming the grantee of the equity of redemption subject to the mortgage, did not come under an obligation to insure for the benefit of the trustee, or such an obligation to indemnify the mortgagor against his liability to insure, (if such liability existed), as would be available to the mortgagee and complainant in this suit.

Third. There was no equitable obligation resting on the defendants to insure for the benefit of the trustee, growing out of their dealings with this property, or growing out of exceptional facts or circumstances of the case. In other words, such a special state of facts and circumstances did not exist as would make it incumbent upon a Court of equity to infer a right in the mortgagee to a lien on the insurance, or to impress the fund collected by the

receiver from the insurance companies with such a lien in favor of the mortgagee and bond holders.

The language employed in the paragraph of the tenth article of the mortgage above quoted is obviously concerned with limitations on the responsibilties and obligations of the mortgagee trustee and bondholders. The language employed is not contractual as between mortgagor and mortgagee, but declaratory of the trusts assumed, and is addressed by the trustee to its *cestuis que trustent.*

The learned Court of Appeals with great clearness in the opinion of *Gray*, Justice, has fully established the validity of this position, and we can add nothing to the reasons therein given.

ARGUMENT—PROPOSITION ONE.

The only basis upon which the mortgagee can claim an equitable lien upon insurance taken out by the mortgagor or his grantee for his own benefit, or in his own name, is some contract, express or implied, to insure for the benefit of the mortgagee; this is the sole basis of the lien; and the mere existence of the lien of a mortgage does not give any right to the insurance.

PROPOSITION TWO.

The equitable principle thus stated can in no way operate to give the trustee under the present mortgage deed, a lien upon the proceeds of the insurance policies taken out by the Penn Company, for no contract, express or implied, was ever entered into by that Company to effect any insurance for the benefit or protection of the trustee, or for the benefit or protection of its cestui que trust.

Pomeroy's Equity Jurisprudence, 364,365.
Cromwell vs. Brooklyn, 44 N. Y. 47.
Wheeler vs. Ins. Co., 101 U. S. 442.
Nicholas vs. Baxter, 5 R. I. 493, 496.
Carter vs. Rocket, 8 Paige N. Y. 436.

First. The only contract that was ever entered into by any party upon the subject of insurance with the said trustee was that entered into by the mortgagor company by the clause in the mortgage which has been quoted above. The only source of the relation of the Penn Company to the property embraced in said mortgage is the deed made to it by W. L. Kann, dated July 2, 1895.

By this deed the Penn Company acquired all the estate and interest in the property covered by the mortgage, which was left in the mortgagor company after the execution and delivery of said mortgage,—which was the equitable fee simple subject only to the estate and in-

terest vested in the said mortgagee by said mortgagee deed of trust.

Unless, therefore, the acceptance of such a deed operates to transfer to the grantee therein the contract which the mortgagor had made with the trustee upon the subject of insurance, it is indisputable that no such contract has ever existed.

Second. Assuming ex gratia argumenti, for the present, that the provision in this mortgage deed of trust of January 1, 1891, relating to insurance, operated as a covenant on the part of the mortgagor with the mortgagee, to insure for the benefit of the mortgagee, yet it was not a covenant running with the land, and thereby becoming binding upon the Penn Company as grantee of the mortgagor company.

That the contract or covenant made by the mortgagor company with the trustee is not a covenant running with the land is not only clear from the well-known definition or description of such a covenant, but has been expressly decided not to be such a covenant.

A covenant to run with the land must extend with the land so that the thing required to be done will affect the quality and value or mode of enjoying the estate con-

veyed, and thus constitute a condition annexed or appurtenant to it.

Moreover, it must be one of such a character that the estate will not be defeated or changed by the performance of it. Moreover, a covenant which runs with the land is one under which either the liability to perform it, or the right to take advantage of it passes to the assignee of the land *whether he be named in it or not.* If, therefore, the covenant to insure is one which runs with the land, the covenant upon the subject in the mortgage in question would have bound the Penn Company, although the equity of redemption had not been conveyed to it *subject to the mortgage.*

In view of these principles, it is established that a covenant contained in a mortgage to insure for the benefit of the mortgage, is entirely personal in its character; does not apply to the land or run with it, but is collateral to the remaining covenants, and does not bind the vendee of the equity of redemption.

Platt on Covenants, 3 Law Library, 183.
1st Jones on Mortgages, Sec. 400.
Dunlap vs. Avery, 89 N. Y. 597, 598.
Reed vs. McCrum, 91 N. Y. 412.
1st Biddle on Insurance, Sec. 254.
2nd May on Insurance, Sec. 452.
Carter vs. Rockett, 8 Paigne, N. Y. 436.

These cases are the leading cases on the subject and stand unattacked; and an inspecton of the same will show that they are founded on an overwhelming line of authorities supporting the above proposition.

The case last cited, namely, that of *Carter vs. Rocket*, decides squarely that a mortgagee has no right to the benefit of a policy taken by the mortgagor unless *by virtue of some contract, express or implied;* but that where a covenant to insure amounts to a covenant to *repair and rebuild*, then it runs with the land and is bindng on the purchaser of the mortgaged premises; otherwise not.

But in addition, the foregoing proposition is substantially admitted for counsel for complainant; therefore, inasmuch as even the conveyance of the land to the Penn Company, subject to the mortgage of $250,000, is to be given the same effect as if it had been conveyed subject to the payment of said mortgage, the only effect of this provision is to make the mortgage debt the debt of the Penn Company, as between it and the mortgagor company, and imply a contract on the part of the Penn Company with the mortgagor company to pay such debt, (with such derivative rights in the mortgagee as results therefrom), but does not create any contract with the said mortgagor that the said Penn Company shall be responsible upon the covenant of said mortgage contained in the mortgage to insure the property for the benefit of the mortgagee; and as, therefore, the only way in which the Penn Company could be bound by said covenant for the insurance would be, *not by its own contract,*

but because said covenant is one which the law annexes to the estate conveyed to the Penn Company, and as such is not its nature and therefore is not binding upon the Penn Company, it necessarily follows that the Penn Company has never come under any contract at any time with the mortgagor company to insure the insurable things on the mortgaged premises.

If the covenant to insure, made by the mortgagor company, was one which runs with the land, and so became binding upon the Penn Company, as assignee of the said land, then for the reasons heretofore stated by us, we think the trustee would have a valid claim on the insurance money; and if, by virtue of the deed to the Penn Company, an implied contract had been entered into by it with the mortgagor, to insure for the benefit of the mortgagee, then, we think, though that contract were made with the mortgagor, the mortgagee for the reason set forth by the Supreme Court of the United States in Keller vs. Ashford, 133 U. S., 622 to 625, could avail itself of a contract thus made between the Penn Company and the mortgagor company, *except for the Act of June 12th, 1878, hereafter to be considered*, and for the reasons before stated, we think the mortgagor could maintain a claim upon the insurance company.

But as it has been shown that the covenant for insurance *does not run with the land*, and that the acceptance by the Penn Company of the deed of equity of redemption in the mortgaged property did not in any way *impose any contract* or obligation upon said company to insure said property, and as the Penn Company did not insure said property for the benefit of the mortgagor or

mortgagee, and having the right to insure and having insured, it follows that the mortgagee has no claim upon the insurance money founded on any contract made by the said mortgagor company.

Third. The Court below (the Circuit Court for the Western District of Pennsylvania), conceding the proposition just stated, after holding that the covenants in the mortgage relating to insurance was a covenant on the part of the mortgagor company to insure for the benefit of the mrtgagee, held, (a) that by the acceptance by the Penn Company of the deed for the property it entered into an agreement with the mortgagor company to *indemnify* it against the mortgage debt; (b) that the covenant on the part of the mortgagor company was incidental and supplementary to the mortgage debt; and that the Penn Company in agreeing to indemnify the mortgagor against the mortgage debt, thereby assumed the covenant which the mortgagor had made with the mortgagee to insure, said covenant to insure being incidental to the mortgage debt.

In answer to this contention of the Court below, the appellant submits:

PROPOSITION THREE.

The acceptance of the deed of the mortgaged property by the Penn Company subject to the mortgage con-

stituted no contract on its part either to indemnify the mortgagor against the mortgage debt, or to pay the same.

PROPOSITION FOUR.

The purchase by the Penn Company and the acceptance of the deed for the mortgage property created no duty to insure for the benefit of the trustees, even if it be conceded that the purchase, subject to the mortgage, constituted a direct assumption and covenant to pay the mortgage debt to the mortgagor which could be enforced by the trustee for its own benefit; in as much as the contract thereby created, if any, was simply to pay the mortgage debt, and this obligation does not carry with it any obligation to perform any of the other covenants in the mortgage.

PROPOSITION THREE AS ABOVE STATED.

This proposition is to be considered:

First. Independently of the Act of Assembly of Pennsylvania, of June 12, 1878.

Second. As affected by that Act.

First. Independently of the Act of 1878:

1. Never at any time or anywhere has it ever been held that a deed of the equity in mortgagd property subject to the mortgage imposed any liability on the grantee in respect of the mortgage debt, unless by the terms of the mortgage there is a personal liability on the part of the mortgagor to pay the debt. Whenever a contract has been implied on the part of the grantee, from the acceptance of a deed of land, subject to a mortgage, this implied contract is wholly between the mortgagor and his grantee. The mortgagee is no party to it; and hence his rights are derived from, measured by, and dependent upon the rights of the mortgagor; and therefore, if the mortgagor could not compel the payment of the mortgage debt or the performance of the covenants of the mortgage, neither can the mortgagee.

"Why should a covenant be inferred from these words, 'subject to the payment of the mortgage,' by the vendee to the vendor to do more than to protect the latter from loss?

"If there is no existing *personal liability* in the "vendor by reason of his bond or promise under "which he can be compelled to pay if the mortgaged "premises prove insufficient, what reason is there

"that he should exact a covenant from his vendee for "the benefit of a stranger?"

If such personal liability does exist, why should he exact more than indemnity? Surely something should appear to create the inference of such a covenant. The words *"under and subject"* import no such thing. They import that the vendee takes the land encumbered and at most that in taking it an agreed consideration which includes the encumbrance, he will indemnify the vendor to the extent of that consideration in the same manner as if it had been paid in cash and so applied at the time."

Moores App. 88 Pa. St. Rep. 453.

This principle was confirmed by the case of **Blood** vs. the **Crew Levick** Co. 171 Pa. St. Rep. 328, which decides "that under and subject to the lien of" or "subject to the mortgage" only constitute a covenant *of indemnity* whereby the purchaser agreed to make good any deficiency left by the sale of the land which is thereby rendered primarily liable;

That this liability on the part of the purchaser does not arise until the land has been sold and the mortgagor has been obliged to pay.

And so in the case of Keller vs. Ashford, 135 U. S. 622, 625, in the review of authorities therein cited, the principle is established: It was said:

"Recovery of *the deficiency after sale of* the mortgaged premises against a subsequent purchaser was ad-

judged in a court of equity to a mortgagee not in virtue of any original equity regarding him. He is allowed by a mere rule of procedure to go as a creditor directly against the person *ultimately* liable in order to avoid circuity of action, and save the mortgagor as the intermediate party from being harassed for the payment of the debt, and then driven to seek relief over against the person who has indemnified him and upon whom the liability will ultimately fall. The equity on which his relief depends is the right of the mortgagor against his vendee to which he is permitted to succeed by substituting himself to the place of the mortgagor." 12 C. E. Green, 655, 656.

2. There never was any individual or personal liability on the part of the mortgagor to pay the mortgage debt or perform the covenants of the mortgage in this case, because by the terms of the mortgage itself, such liability was expressly excluded.

That provision of the mortgage will be found in Article Fourth of the mortgage, Exhibit A, on page 29 of the record of the original bill, and is as follows:

"It being expressly understood and agreed by and between the parties hereto and by and between the said party of the first part, and the respective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by said bonds, shall ever be commenced or prose-

cuted, either against the party of the first part or any of its officers, directors or shareholders, either by the said holders of said bonds, or coupons, or of any of them, or by any person or corporation to whom the same, or any of them may be assigned and transferred, except such suits or proceedings as shall be necessary to recover the said premises hereby conveyed, or to subject the same to the payment of said debts; and that the sale of the said mortgaged premises, whether under this power of sale, hereby granted, or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part, upon the said bonds and coupons accompanying the same and of the obligations of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of said indebtedness or for a less price; anything in said bond and coupons contained to the contrary hereof notwithstanding."

But, in addition, no equitable lien can be inferred from the insurance clause, nor any intention to create one even on the theory that the mortgagor covenanted to insure for its benefit, because other remedies are provided for the breach of such covenants, and those remedies are confined to the land and are exclusive of any other remedies, or of any theory of an intention to create an equitable relief.

The second article of the mortgage gives the trustee the right to enter and take possession of the premises for any default, *inter alia*, in the performance of any covenants, agreement, or stipulation contained in the mortgage. (Record Vol. 1, page 25.)

Or to subject the same to sale. (Record Vol. 1, pages 26, 27.)

To insure its own interest and charge the premiums as liens upon the property and upon the fund. Article 10, Record Vol. 1, pages 34 and 35.

The remedies are restricted to the land and there is an express exemption from any individuality either for the covenants or the mortgage debt. Record Vol. 1, page 19; Art. 4, Rec. Vol. 1, 29.

Even if there were no express provisions in the mortgage allowing the mortgagee to insure and to make the premiums a charge in the land or fund, still if there was a covenant to insure for the benefit of the mortgage and the mortgagor failed to do so, the mortgagee could insure and charge the premiums to the mortgage and the cost of such insurance would be a proper measure of damages for the breach of the covenant to insure. This was decided in Foster vs. Parker, 5 Grey, 548 and in White vs. Brown, 2 Cushing, 412.

The remedies being restricted to the land, no personal liability for the mortgage debt or for the performance of any of the covenants in the mortgage can be implied.

"Where there is no personal obligation or covenant in the mortgage to pay the mortgage debt, then the only remedy is against the property mortgaged." 2 Jones on Mortgages, No. 1225.

3. The very terms of the mortgage having thus provided against any personal liability on the part of the mortgagor company, either in respect of the mortgage debt, or in respect of any of the obligations and covenants therein contained, it necessarily follows, from the foregoing, that the grantee of the equity of redemption can be under no personal obligation either in respect of the mortgage debt or the covenants therein contained.

4. Therefore, even if the covenant to insure could be treated as a covenant running with the land in ordinary cases, yet in this case it could not be so considered because if not personally binding upon the mortgagor it could not have been intended to be binding on its grantee.

Secondly. Independent of the foregoing, the Act of June 12, 1878, Brightlys Purdon's Dig. 1837, pages 2930; P. L. of Pa., page 205, operates to prevent the conveyance of the property to the Penn Company from imposing any personal liability upon it to the mortgagor company in respect to the mortgage debt, and therefore of necessity excludes any liability on the part of said company to the mortgagee in respect of said mortgage debt.

That Act is in the following terms:

"Grantees of real estate which is subject to ground rent or bound by mortgage or other incumbrance, shall not be personally liable for the payment of such ground rent, mortgage or other incumbrance unless he shall by an agreement in writing have expressly assumed a personal liability therefor; or there shall be express words in the deed of conveyance stating that the grant is made on condition of the grantee assuming such personal liability; *provided* that the use of the words 'under and subject to the payment of such ground rent, mortgage or other incumbrance' shall not alone be construed so as to make such grantee personally liable as aforesaid.

"The right to enforce such personal liability shall not inure to any person other than the person with whom such agreement is made; nor shall such liability continue after the said grantee has parted bona fide with such encumbered property, unless he shall have expressly assumed such continued liability."

In the latest case decided before the passage of the Act of 1878, namely, Moore's Appeal, 88 Pa., 453, supra, which case, though decided in 1879, interpreted transactions in existence before the Act of 1878, the Court decided, reviewing the whole subject, that an examination of the previous decisions of the Court would show that where the mortgaged property was sold by the holder of the equity of redemption and conveyed to the purchaser, subject to the payment of the mortgaged debt (or as we now assume, subject to the mortgage), such clause has no other effect than

to create a covenant on the part of the grantee with his grantor to indemnify said grantor in respect of the payment of the said mortgage debt, and that for this purpose the grantee thereby, as between himself and his grantor, makes the mortgage debt his own and becomes personally responsible therefor to said grantor; that whenever the grant of the equity of redemption in previous decisions of the Court had been held to create a covenant with the mortgagor to pay the mortgage debt which can inure to the use of the mortgagee, and on which he can sue in his own name, or in the name of the vendor, there had been an agreement to pay the mortgage debt, either expressly or implied, through circumstances.

It will be seen, therefore, that this case decides:

(a) That the words "under and subject" or "subject to the mortgage," created only a contract of indemnity.

(b) That where there is no personal liability on the part of the mortgagor to pay the mortgage debt, no contract whatsoever arises from those words upon the part of the grantee, and there is no liability on him to pay the mortgage debt or perform the covenants of the mortgage.

These same principles were decided by the late case of Blood vs. Crew Levick Co., 171 Pa., 339, which will hereafter be referred to more at length.

But whether the contract with the grantor implied on the part of the grantee of the equity of redemption by taking it in a deed with the clause "subject to the payment of the mortgage debt," or "subject to the mortgage," is to be taken as limited to a contract to indemnify the grantor in respect of the payment of the mortgage debt, as thus authoritatively determined by the Court in its latest decision upon transactions arising prior to the Act of 1878; or as an implied contract with the vendor to pay the mortgage debt, altogether irrespective of the determination in advance, that its payment by the grantee was necessary to save the grantor from loss, as would appear to be the idea entertained by the Court in some of its earlier decisions, is altogether immaterial to the matter which we are now to present. For whether it be one or the other, all the cases without exception hold:

(1) That the liability of the Grantee because of the acceptance of a deed of the equity of redemption, containing the clause in question, arises out of an implied contract.

(2) That the implied contract is one between the grantee and his grantor.

(3) That the contract is that the grantee will be personally responsible to the grantor for the mortgage debt.

Now, what does a contract by the grantee with the grantor, who accepts the deed of the equity of redemption containing the clause in question, that the former will be personally responsible to the latter for the payment of the mortgage debt, mean? It can mean but one thing; and

that is, that he will be personally responsible for the payment of the debt, and thereby he agrees that instead of the land mortgaged being alone liable for the debt, and that for any deficiency arising from its sale the mortgagor shall be alone responsible, the said mortgage debt shall become, to all intents and purposes, as between him and the mortgagor, the personal debt of the grantee; so that, like all other debts which he may owe to anyone, all of his estate and property of every kind and description may be, by due process of law, subjected to the payment of said mortgage debt.

The implied contract for this personal responsibility thus made being one altogether between the mortgagor and his grantee, it necessarily follows that whatever rights the mortgagee has to enforce this contract is altogether a derivative right, and one derived altogether from, and dependent upon, the contract made between the mortgagor and his vendee, to which the mortgagee is no party.

133 U. S., 623-625, above cited.

Second. **The effect of the Act of 1878 is necessarily to abolish any liability of the grantee to his mortgagor in reference to the mortgage debt, except where the grantee has expressly assumed such liability in writing, and such liability as between the mortgagor and his grantee does not arise from the words "under and subject" or "subject to the payment of."**

In the light of the principles of law thus established, let us examine the provisions of section 29 of the Act of 1878.

1. According to these principles, a clear distinction is recognized as existing between the personal responsibility of the grantee to the mortgagor of mortgaged property, arising out of an express contract by the grantee to pay the mortgage debt, and such responsibility arising out of the implied contract declared to result from the acceptance of a deed containing the clause, "subject to the payment of the mortgage," or, "subject to the mortgage." The express contract would, of course, depend for its legal effect on its own terms; and a party entering into such a contract must be supposed to know its effect. But the insertion of the clause, "subject to the payment of the mortgage," had been held to imply, as matter of law, altogether irrespective of what might have been the real intention of the parties in any particular case, a contract by the grantee to become personally liable (the meaning of which has been above explained), to the grantor for the payment of the debt to the extent at least necesary to indemnify the mortgagor.

Now the statute, in language so plain, positive and explicit, that he who runs may read and understand it, declares that as to all future transactions, the Legislature means to inaugurate a new legal policy upon this subject; and thereby to declare that no one taking a grant of the equity of redemption of real estate then subject to a mortgage, shall ever be personally liable for the payment of a mortgage by virtue of any implied contract or agreement; but that in order that he should be so personally liable, he must have made an express contract to that effect, which must be made either by an agreement in writing, expressly assuming a

personal liability for the mortgage debt, or there must be, in the deed itself, express words stating that the grant is made on condition of the grantee assuming such personal liability. And in order to provide against any possibility of any misunderstanding, and with most manifest reference to the course of decision by the Supreme Court of the State, it adds the proviso that the use of the words, "under and subject to the payment of such mortgage" shall not be so construed as to make such grantee personally liable.

2. The Legislature having thus declared its wish that an entirely new legal policy should exist on this subject matter in the future, whose rights are designed to be effected by the new policy as embodied in the statute?

The language of the Act is so clear and plain that it is impossible to understand how there can be more than one answer to the question propounded.

To apply the statute, we must assume the existence of a mortgage, and the parties to it, mortgager and mortgagee, and the proposed sale by the mortgagor of his equity of redemption, and a purchaser willing to buy it.

Intending to provide for such a state of case, the Act declares that a grantee of real estate which is bound by mortgage shall not be personally liable for the payment of such mortgage, unless he shall have made an express written assumption of such personal responsibility in one of the two ways described in the 29th section of the Act.

Now from what does the statute save every such grantee, unless there is the written document described in the statute? He is saved from personal liability for the mortgage debt; that is to say, he is saved from all personal liability for said mortgage debt. Now, how can he be saved from all personal liability for the mortgage debt? To be saved from all personal liability for the mortgage debt, unless there is the written assumption of liability described in the statute, he must, of necessity, be saved from all personal liability to any and every one who, by virtue of his becoming a party-grantee to the said equity of redemption, would have a right to hold him to a personal responsibility for the mortgage debt under the laws in force in Pennsylvania. Now at the time of the passage of this Act, as we have seen, if a grantee of an equity of redemption accepted the deed therefor with the clause "subject to the payment of the mortgage debt" an implied contract was made by the grantee with his grantor to become personally responsible to the said grantor for the mortgage debt, and by his personaal responsibility to indemnify the mortgagor in respect of the mortgage debt (or possibly to pay the same,) and that this contract was a contract only between the grantor and grantee; and if the mortgagee had any rights under it, they were only the derivative rights enforcing the obligation thus entered into by the grantee with his grantor.

But at all events, the primary liability of the grantee was to his grantor alone, and the whole object of the implication of the contract to pay the mortgage debt, from the insertion of the clause in question, was for the benefit of the grantor of the equity of redemption, in order that he might be saved from being obliged to pay, out of his own estate having parted with his own mortgage estate, the mortgage debt.

Now, as the only possible way in which the grantee of the equity of redemption can be relieved from all personal liability for the payment of the mortgage debt is that he shall be relieved from all personal liability therefor to all persons who, except for said statute, (assuming that the clause "subject, etc.," to be in the deed conveying the equity) would have had a right to hold him to a personal responsibility for said mortgage debt, it, of necessity follows, that he must be free from personal liability to his mortgagor grantor to whom, as we have seen, his primary liability existed, as well as free from the derivative liability under which he would have been to the mortgagee by virtue of his primary liability to the mortgagor grantor; for it is indisputable that if, without the written assumption of liability mentioned in the statute, the grantee of the equity of redemption still remains liable, personally, to the mortgagor grantor, he is not free from all liability for the mortgage debt; and yet the statute declares that every grantee of an equity of redemption shall be free from all personal liability for the mortgage debt, unless there is the written assumption of liability mentioned in the statute.

It would be ascribing to the Legislature of Pennsylvania the most marvelous ignorance of the plain and obvious meaning of words, to attribute to it an intention to hold the grantee of the equity of redemption still personally responsible for the mortgage debt, merely because there was in the deed of grant the clause "subject to the payment of the mortgage debt"; and only to prevent such grantee from being personally liable to the mortgagee for the mortgage debt, when, by the language in the statute, it is declared that no grantee of an equity of redemption shall be personally liable for the payment of the mortgage unless he makes a written assumption thereof, and that the clause

in question shall not be construed as to make the grantee personally liable; and when the Legislature must have known, when it passed the Act, that the primary liability produced by the insertion of such a clause was that of the grantee to the mortgagor grantor.

It is not conceivable that if the Legislature had any intention of saving the personal liability of the grantee for the mortgage debt to the Mortgage Grantor, it would not have so declared on the face of the Act.

3. This interpretation of the 29th section of the Act, so plainly and irresistibly manifest on the face of the said section, is also made evident by the 30th section of the said Act. For this section declares that the right to enforce such personal liability for the mortgage debt shall not inure to any person other than the person with whom the agreement was made. Now, the right to enforce personal liability mentioned is where there is an express contract in writing on the part of the grantee to assume it,or its assumption is made a condition in the grant, as set forth in the 29th section. Therefore, it is declared that the right to enforce the personal liability, when the assumption of it has been made in writing, shall only inure to the mortgagor grantor if it is made with him. It is clear, therefore, that if the Legislature had intended by the 29th section to retain the implied liability upon the part of the grantee, it never would have thought it worth while to declare that the express contract of personal responsibility, when made with the grantor, should inure only to him.

Therefore, counsel emphatically contend that the Act of 1878 takes away all liability of the grantee to the mortgagor unless there is an express assumption of such liability other than that growing out of the words "under and subject to the payment" and "under and subject to the mortgage."

4. There is nothing in the decisions which have been cited by the Court below to support its contention that the Act did not apply to the implied contract arising between the mortgagor and his grantee to sustain such contention. They are distinguishable and do not have the effect claimed for them. Those cases are 160 Pa., 193, Lennox vs. Brewer; 171 Pa., 328, Blood vs. Crew Levick Co.; 177 Pa., 606, same parties.

In the last mentioned case, nothing is said bearing upon this subject other than the declaration by the Court that it approved of the Court's opinion in the case between the same parties, as reported in 171 Pa., page 328. In the case in 160 Pa., 193, the Court had no occasion at all for the decision of the case before it, to determine the true construction of the Act of 1878. All that it says upon this subject is hereinafter stated.

In the case of Blood vs. Crew Levick Co., 171 Pa., p. 328, there was an assignment of the equity of redemption in certain freehold land, and also the assignment of the equity of redemption in certain leasehold land. The action was brought by the executrix of the mortgagor to recover

against the assignee of the equity of redemption of both classes of property to recover the balance of the mortgage debt upon the respective pieces of property remaining unpaid after the sale of the land at foreclosure sale under the mortgages. So far as the freehold land is concerned, it is not necessary to say anything, because the Court found that as to that land there was an express contract on the part of the assignee of the equity of redemption to pay the mortgage debt. As regards the action to recover the balance of the mortgage debt unpaid by the foreclosure proceedings on the leasehold estate, the Court decided that the action could not be maintained because the executrix of the mortgagor had not paid the mortgage money to the mortgagee, which she sought to recover from the assignee of the mortgagor. All that the Court says in reference to the Act of 1878 is as follows:

"The Act of 1878 plays no part in this case. The action is not brought by the holder of the mortgage to assert a personal liability against the vendee, and for that reason, the Act does not apply (160 Pa., 191, Lennox vs. Brower.)"

"So far as the mortgage on the freehold is concerned, this is an action by the vendor against his vendee, upon an express contract."

"So far as the mortgage on the leasehold is concerned, the action is upon the implied covenant. The trouble does not grow out of the Act of 1878, but out of the fact that as to the mortgage on the leasehold, the implied covenant does not seem to have been broken."

By the latter expression the Court means and explains that the mortgagor not having paid the mortgage had no right of action against the grantee of the equity of redemption. There can be no doubt, of course, that the Court does hereby declare that the action could have been maintained by the executrix of the mortgagor if she had paid the mortgage debt, and that action would have been maintained on the implied covenant to idemnify the mortgagor grantor, which was contained in the deed of assignment of the equity of redemption, in which deed the property was conveyed to the grantee, "subject to the lien of the mortgage." And the Court does also place its opinion upon this subject upon the case in 160 Pa., 191, declaring, in effect, that as the action was not by the holder of the mortgage to assert a personal liability against the vendee, the act of 1878 did not apply to the transaction.

But it will be found that the case in 160 Pa., 191, in no way decides that the only effect of the Act of 1878 is to prevent a mortgagee from having a claim against the grantee of the equity of redemption upon the personal liability of the latter for the mortgage debt. Upon the contrary, the Court in that case decided that the Act of 1878 had no application to the suit of the plaintiff in that case, because it was a suit by the vendor of certain property to recover of his vendee the unpaid balance of the purchase money of certain property, which had been agreed to be paid by the vendee to the vendor.

The Court said:

"This is not a suit by the holder of a mortgage against a

grantee who had bought "under the subject," and whom this Act was meant to protect, or by the holder of a discharged mortgage who was attempting to hold the grantee liable on his mere promise to pay. The suit was by the grantor for for the unpaid balance of the purchase money, and consequently the Act of June 12th, 1878, had no application, and no question of validity of the promise to a third party or the right of such party to enforce an agreement made for his benefit arose in the case."

Now it will be observed that the Court says as its reason for the non-application of the Act of 1878 to the case that the suit was neither (1) one by the holder of a mortgage against the grantee; nor (2) was it a suit by the holder of a discharged mortgage who was attempting to hold the grantee liable on his mere promise to pay.

The holder of a discharged mortgage in the opinion referred to could only be the mortgagor, because he alone, except the mortgagee, would be the person to have discharged the mortgage; and the Court could not have referred to the mortgagee when speaking of the holder of a discharged mortgage, because the Court had already spoken of a suit by the holder of the mortgage, that is, the mortgagee. There is nothing, therefore, in this case inconsistent with what we have above said to be the single and necessary construction of the Act of 1878; that is to say, when there is no written assumption, it relieves the grantee of the equity of redemption from liability for the mortgage debt against every one who, but for such Act, could have maintained that liability by virtue of the acceptance of the deed containing the clause in question.

Now, although, as we have said, the Court in the case in 171 Pa., 328, when it refers to the case in 160 Pa., speaks of it as if it had decided that the Act does not apply unless the action is brought by the holder of the mortgage to assert a personal liability against the vendee, it is manifest that this is a misconception of what the Court did decide in the last mentioned case.

Moreover, the declaration now being referred to by the Court in 171 Pa. was in no way necessary to the decision of that case; for the Court decided altogether, irrespective of the Act of 1878, that the suit of the plaintiff against the assignee of the equity of redemption of the leasehold estate, could not be maintained upon the implied contract arising from the acceptance of the deed with the clause in question in it, because the plaintiff, the executrix of the mortgagor, had not paid the mortgage debt, to recover which the suit was brought. Therefore, even if the Act of 1878 did not apply to the case, the plaintiff could not recover. So far as the action grew out of the sale of the freehold estate, the court found that there was a special written agreement to pay the mortgage debt on the face of the assignment, and treated that as an agreement to become personally responsible for the mortgage debt, so that even if the Act of 1878 did apply to said assignment, under the Court's construction of said assignment, the assignee was personally responsible.

Counsel submit, therefore, that it is very apparent that the Court in this case could not have brought to bear upon the provisions of the Act of 1878, its judicial mind to an extent necessary to appreciate the plain and obvious and indisputable effect of its clear language. For it is incon-

ceivable to the legal mind, that if it had done so, it could have reached the conclusion that the grantee of the equity of redemption continued, notwithstanding the Act of 1878, to be under a personal liability for the mortgage debt, without the written assumption provided for in that Act and merely because the assignment deed contained the clause "subject, etc.," when the Act expressly declares that such clause shall not affix any personal responsibility upon the assignee, and therefore, of necessity, declares that no one shall have a claim for such personal responsibility by virtue of said clause.

5. But in no event is the case of Blood vs. Crew Levick Company, 171 Pa. 328, or the case in 160 Pa., 191, upon which the decision is based, binding upon the United States Courts in this case.

Even if counsel are mistaken in the position which they have taken with reference to the case last mentioned, the decision of the Supreme Court of Pennsylvania herein is not binding upon the United States Court in this case, for the rule upon this subject as firmly adopted by the Supreme Court of the United States is that the Courts of the United States, in the administration of state laws in cases between the citizens of different states, have an independent jurisdiction co-ordinate with that of the State Courts, and are bound to exercise their own judgment as to the meaning and effect of these laws.

Where, however, by a course of decisions of the State Courts certain rules are established which become rules of property and action in the State, and have all the effect of law, especially with regard to the law of real estate and the construction of state statutes, the Courts of the United States always regard such rules as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the United States Courts to exercise their own judgment; and when contracts and transactions have been entered into, and rights have accrued thereon, at a time when there has been no decision upon the statutes involved, the Courts of the United States assert the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be given by the State Courts after such rights have accrued.

Burgess vs. Seligman, 107 U. S., p. 20.
Carroll County vs. Smith, 111 U. S., p. 563.
Boles vs. Brinfield, 120 U. S., 763.

The case in 171 Pa. was not decided until October, 1895; the deed of the equity of redemption to the Penn Company was made in July, 1895; therefore, the contractual rights of the Penn Company were established, and its obligations established, before the decision of the Supreme Court of Pennsylvania referred to; and therefore, this decison is not binding upon the United States Courts in this case.

Although the case of Lennox vs. Brower, 160 Pa., 191, was decided before July, 1895, having been decided in March, 1894, it did not, as we have above shown, put any construction upon the Act of 1878 inconsistent with what we have said is inevitably its true construction. But even if counsel could be mistaken in this, such single decision would not, under the cases which we have above cited, be binding upon the United States Courts in this case, in the face of the plain meaning of the statute.

That this is true also appears from the following:

We have said above that it would appear from one part of the opinion of the Court in the case of 171 Pa., 328, as if the Court thought that, notwithstanding the Act of 1878, the rights of the assignee of the equity of redemption and its obligations as between such assignee and the mortgagor grantor under a deed of the equity of redemption containing the clause, "subject, etc.," were the same since the passage of the Act of 1878 as they were before its passage; but in another part of the opinion in describing the obligations of the assignee of the equity of redemption, the Court deciares that the legal import of the "under and subject to the lien of" clause in such a deed is that the vendee will discharge the lien of the incumbrance by payment, or in default thereof, that the land shall remain liable therefor and shall be as between himself and his vendor primarily liable to the extent of its actual value; and if the mortgage money is more than the value of the land, the vendor will be liable for his creditor, that is the mortgagee, for such surplus, but will be without recourse to his vendee for the amount so paid.

Now certainly this is a very different extent of liability on the part of the vendee of the equity of redemption than that which had been determined to be his liability by the decisions of the Suprehe Court of Pennsylvania, which we have quoted, anterior to the passage of the Act of 1878; for, by those decisions, it had been determined that as between the vendor of the equity redemption and his vendee, where the deed contained, the "subject, etc.," clause, the vendee was personally responsible, that is, responsible in the whole of his estate of every kind for any deficit which would exist between the value of the land as ascertained, in the only way it could be ascertained, that is, by a sale, and the amount of the mortgage debt.

Therefore, if the Court in 171 Pa., 378, decides that the vendee of the equity of redemption under a deed containing "the subject, etc.," clause, is only responsible to the vendor to the extent of the value of the land, which value could only have been ascertained by a sale, it is very certain that the Court has determined that there is no personal responsibility in the proper sense of the term, since the passage of the Act of 1878, on the part of the vendee of the equity of redemption, even to his vendor, under an assignment which has not an absolute stipulation to pay the mortgage in it, but only has "the subject, etc.," clause.

Counsel is bound to confess that the case now being referred to is one which is certainly inconsistent in its several parts and is one which cannot be followed by the United States Courts.

6. If because of the absence of written assumption of personal liability for the mortgage debt mentioned in the Act of 1878 or otherwise, the Penn Company never was under any personal obligation to the mortgagor company to pay the debt, then the whole foundation upon which the right of the mortgagee to enforce a personal obligation against the Penn Company fails, and all possible claim upon the part of the mortgagee against the Penn Company growing out of the assignment of the equity of redemption in the mortgaged property, is at an end.

If counsel are right in the interpretation which they have placed upon the Act of 1878, namely, that in the absence of a written assumption of a liability, the grantee is not liable even to the mortgagor, then all possible foundation, even upon the line of reasoning pursued by Judge Buffington in his opinion for any claim upon the insurance money by the mortgagee in this case is entirely taken away; for the only claim which by possibility could be maintained by the mortgagee for the insurance money would be founded upon the following propositions:

1. That the deed of assignment of the equity of redemption to the Penn Company with the clause in question inserted therein operated as a contract upon the part of the Penn Company with the mortgagor company to be personally responsible for the mortgage debt.

2. That although no contract was thereby made with the mortgagee by the Penn Company, yet upon established principles of equitable jurisdiction, the creditor is entitled

to all the collateral securities which the debtor has obtained to reinforce the primary obligation. The purchaser of land subject to a mortgage, who assumes and agrees to pay the mortgage debt, becomes as between himself and his vendor the principal debtor, and the liability of the vendor as between the parties to the deed of assignment is that of surety. If the vendor pays the mortgage debt he may sue the vendee at law for the money so paid. In equity a creditor may have the benefit of all collateral obligations for the payment of the debt which a person standing in the situation of a surety for others holds for his indemnity; and upon the application of this principle, the mortgagee may enforce against the grantee of the mortgagor a personal obligation which the grantee has entered into with the mortgagor to pay the debt.

133 U. S., 624-625.

Fuller vs. Hughes, 12 N. Y. 79.

It, of necessity, follows, therefore, that if because of the absence of the written assumption of personal liability of the mortgage debt mentioned in the Act of 1878, the Penn Company never was under any personal obligation to the mortgagor company to pay the debt, the whole foundation upon which the right of the mortgagee to enforce a personal obligation against the Penn Company fails, and all possible claim upon the part of the mortgagee against the Penn Company, growing out of the assignment of the equity of redemption in the mortgaged property is at an end. For no one, of course, could be found to claim that if the Act of 1878 denies to the mortgagor any claim for personal responsibility of the assignee of the equity of redemption,

without a written assumption of that personal responsibility for any portion of the mortgage debt, the said mortgagor could have no claim by virtue of the assignment "subject, etc.," against the assignee to compel him to respond to the covenant for insurance for the benefit of the mortgagee or for the benefit of the mortgagor. Every one would, of course, admit that if it was the intention of the Act of 1878 to relieve the assignee of the equity of redemption of all personal responsibility for the mortgage debt without the written assumption required by the Act, there necessarily went with that denial of responsibility on the part of the assignee, any responsibility for the performance of the other personal covenants contained in the mortgage including the covenant for insurance. And, indeed, the whole contention of Judge Buffington for the liability of the Penn Company as assignee of the equity of redemption to insure for the benefit of the mortgagee, is based upon the proposition that the duty to insure was incidental and supplemental to the mortgage debt.

Now, while it is not true that the obligation to insure necessarily followed an assumption of the mortgage debt, no one will pretend that there could be any obligation to insure on the part of the assignee of the equity of redemption, if he is entirely free of any personal obligation to pay the mortgage debt; and if the only remedy for the payment of the mortgage debt after an assignment of the equity of redemption, either on behalf of the mortgagee or mortgagor, is a resort to the land mortgaged.

Now, there can be no doubt that if the Legislature, by the Act of 1878, intended, as we have shown it did intend, to relieve the assignee of the equity of redemption of all personal liability in connection with the mortgage, in the ab-

sence of the written assumption, the only resort which the mortgagee or mortgagor could have for the payment of the mortgage debt, was a resort to the property mortgaged.

7. But independently of the Act of 1878, the Supreme Court has decided and it is established law, that if there is no personal obligation on the mortgagor to pay the mortgage debt, there is none upon the grantee and therefore no implied contract to pay the same arises.

This was held, first, in the case of Moore's Appeal, 88, Pa., 453, where the Court in deciding the above principle, said:

"Why should a covenant be inferred from these words, that is, 'subject to the payment of the mortgage' by the vendee to the vendor to do more than to protect the latter from loss? If there is no existing personal liability in the vendor by reason of his bond or promise under which he can be compelled to pay if the mortgaged premises prove insufficient, what reason is there that he should exact a covenant of his vendee for the benefit of a stranger? If such personal liability does exist, why should he exact anything more than indemnity? Surely something should appear to create the inference of such a covenant. The words, 'under and subject' import no such thing. They import that the vendee takes the land encumbered, and at most, that so taking it, at an agreed consideration, which include the incumbrance, he will indemnify the vendor to the extent of

that consideration, in the same manner as if it had been paid in cash and so applied at the time."

This principle was confirmed by the case of Blood vs. The Crew Levick Company, 171 Pa., 328, which decide that "under and subject to the lien of," or "subject to the mortgage" only constitute a covenant of indemnity, whereby the purchaser agrees to make good any deficiency left by the sale of the land, which is thereby rendered primarily liable:

That this liability on the part of the purchaser does not arise until the land has been sold and the mortgagor has been obliged to pay.

It therefore follows that this case decides that if there is no personal liability on the part of the mortgagor that there never can be any assumption of the mortgage debt or liability to pay on the part of the grantee.

It therefore follows that, inasmuch as it has been shown that the rights of the mortgagee are derived solely and simply from the contract of the mortgagor, that the mortgagor was not personally liable for the mortgage debt or the covenants, the grantee cannot possibly be so liable. And counsel for defendant call to the attention of the Court the fact:

That there never was any individual or personal liability on the part of the mortgagor to pay the mortgage debt or perform the covenants of the mortgage in this case, because by the terms of the mortgage itself, such liabilty was expressly excluded.

That provision of the mortgage will be found in Article Fourth of the mortgage, Exhibit A, on page 29 of the record of the original bill, and is as follows:

"It being expressly understood and agreed by and between the parties hereto and by and between the said party of the first part, and by the respective holders of the said several bonds collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by said bonds, shall ever be commenced or prosecuted, either against the party of the first part or any of its officers, directors, or shareholders, either by the said holders of the said bonds, or coupons, or any of them, or by any person or corporation to whom the same, or any of them, may be assigned and transferred, except such suits or proceedings as shall be necessary to recover the said premises hereby conveyed, or to subject the same to the payment of said debts; and that the sale of said mortgaged premises, whether under this power of sale hereby granted or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part upon the said bonds and the coupons accompanying the same and of the obligations of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of said bond and coupons or therein contained to the contrary hereof notwithstanding."

The contention of Judge Buffington in regard to the effect of this clause is that the clause only provided for the discharge of an existing liability on the part of the mortgagor did he sell; and that if the sale had not taken place, the personal liability of the mortgagor company for the mortgage debt still existed, and that the covenant to insure

created a personal liability on the part of the mortgagor for the mortgage debt.

This position is manifestly untenable. If, as is provided in the foregoing clause, no suit can be maintained to enforce an individual liability, it is manifest that no personal liability can exist and the mortgagor can never be called upon to pay the mortgage debt.

The invalidity of the contention that the covenant to insure, in the face of this direct provision that there should be no individual liability, constituted a liability on the part of the mortgagor requires no argument.

It has therefore been demonstrated that there was no liability on the part of the Penn Company to pay the mortgage debt or perform any of the covenants of the mortgage, because the Act of 1878, exempted it from any such liability; and, assuming that it did not, the mortgage itself expressly excludes any liability on the part of the mortgagor, and consequently on the part of the grantee to the mortgage.

Judge Buffington, in his opinion, held that the Act of 1878, did not apply to the present case for the following reasons:

In support of the argument contained in the above referred to portion of our brief, that upon the true construction of the Act of 1878 it operates as well on the question of liability of the grantor to the mortgagor as to the liability to the mortgagee, we refer the Court

(as decisive of the correctness of our contention), to the recent case of

Wunderlich vs. Sadler, 189 Pa. 469.

In that case, in a statement of action filed, the allegation was that the deed contained the following language, to wit:

"Subject also to the mortgage (then follows description and record of mortgage), all of the above mortgages being assumed by the said parties of the second part hereto as a part of the consideration herein named."

The statement did not show whether the assumption was a clause in the deed, or was an oral agreement, or was contained in a collateral written agreement. The record of the deed was referred to in the statement and made part thereof. The affidavit of defense denied the making of any promise or agreement of liability for the mortgage. Held:

(1.) That if it was an oral agreement, it was void under the Act of June 12, 1878, P. L. 205.

Thirdly. But even if it should be conceded for the sake of the argument that the foregoing construction of

the Act of 1878 made by Counsel for the appellee is not the true one, and conceding that all the act intended to do was to prevent any personal liability for the mortgage debt to the mortgagee, unless there was a written assumption of liability required by the Act, and that the Act did not affect the liability of the Penn Company to the mortgagor for the mortgage debt, still the mortgage trustee has no claim upon the insurance money in this case.

Judge Buffington, in his opinion in the Circuit Court, held that the Act of 1878 did not apply to the present case, for the following reasons:

That the Act simply abolished the direct liability of the grantee to the holder of the mortgage which some cases had previously held to exist by virtue of the "under and subject to the payment" clause, and left unaffected and untouched the previously existing implied covenant arising therefrom on the part of the grantee to indemnify his vendor against the mortgage debt.

That because the implied liability of the grantee to indemnify the vendee was left unaffected, therefore the act did not apply to a case where the holder of the mortgage was not trying to hold the grantee on a direct assumption, but was endeavoring to enforce this liability against him as surety of the vendor mortgagor (the latter being insolvent), and the holder of the mortgage claiming through and under the mortgagor.

This contention is utterly invalid, because, in the first place, this is a direct action by the mortgagee to enforce the alleged liability of the grantee arising from his purchase of the mortgaged premises subject to the mortgage; and even if it be assumed that the mortgagee is seeking to enforce this liability through the rights derived from the mortgagor, it is none the less a fact that this is an action by the holder of the mortgage to enforce a liability against the grantee arising from the purchase by the grantee subject to the mortgage; and there is no authority that holds that in such case the Act of 1878 does not apply and this appears equally from the following:

If the assignee of the equity of redemption is to be under no personal liability to the mortgagor for the mortgage debt, it is absolutely certain, for the reasons hereinbefore stated, that it could not have been the intention of the Legislature, while freeing him from any personal liability for,—that is to say, from any obligation to pay,—the mortgaged debt, which mortgage debt is the main thing in the mortgage, the assignee was to be left under a personal obligation for a subordinate covenant in the mortgage; that is to say, the covenant of the mortgagor to insure. As has been said heretofore, the statement of this proposition is all that is needed to command assent to it.

Now this being true, as the statute has declared, when applied to the case of the assignnment to the Penn Company, that the mortgagee trustee shall have no claim against the Penn Company either in respect of the payment of the mortgage debt or the obligation of the mortgagor company to insure, it necessarily follows that the mortgagee trustee can have no claim upon any of the

estate or assets of the Penn Company other than a right to sell the mortgaged property and apply the proceeds of the sale to its mortgage debt.

Now, as the insurance money is an asset, or property of the Penn Company, the mortgagee trustee has no other claim to this asset or property than it would have to horses, or plate glass made by the company, or any other article belonging to said company.

Even if it be admitted, therefore, that the mortgagor company by reason of the fact that upon the construction of the Act of 1878, which we are now assuming to be the true one, could maintain an action against the Penn Company upon its covenant to insure, or for the amount of the mortgage debt, because the personal liability of the Penn Company to the mortgagor company remains to all intents and purposes just as if the Act of 1878 had not been passed, *yet, as that Act declares that the mortgagee shall have no right to enforce any personal responsibility against the Penn Company,* there is no foundation for its claim for this insurance money.

For if it should be held as Judge Buffington held, that the mortgagee company has a right to this insurance money by virtue of the contract made by the Penn Company with the mortgagor company, that because the mortgagor company would have a right to enforce against the Penn Company the performance of the contract thus entered into between the Penn Company and the mortgagor company, the provision of the Act of 1878, which declares that the *mortgagee* shall have no rights growing

out of the personal liability of the assignee of the equity of redemption would be rendered entirely nugatory.

For we have seen before the Act of 1878 the only right which the mortgagee company ever had against the assignee of the equity of redemption was the right to enforce the contractual obligation entered into between the mortgagor and its, or his, vendee, arising out of the acceptance by the vendee of the assignment containing the clause in question. Now if, notwithstanding the fact that the Act of 1878 declares that without the written assumption of personal liability the assignee of the equity of redemption shall be under no personal liability in respect of the mortgage to the mortgagee, the latter may enforce the personal liability which remains, notwithstanding the Act of 1878, on the part of the assignee to the mortgagor, the mortgagee has precisely the same rights against the assignee of redemption that he had before the passage of the Act of 1878; and yet if we lean on the assumption of the construction of the Act which we are now making, it was the intention of that Act to take away all right upon the part of the morgagee to enforce any personal liability of any kind upon the part of the assignee of the equity of redemption to the mortgagee unless there was the written assumption mentioned.

If, therefore, there can be no possibility of claim by the mortgagee to the insurance money, except through the existence of a personal liability on the part of the Penn Company, enforceable for the benefit of the mortgagee, it necessarily follows that it has no claim upon the insurance money.

PROPOSITION FOUR.

The purchase by the Penn Company and the acceptance of the deed for the mortgaged property, created no duty to insure for the benefit of the trustee, even if it be conceded that the purchase subject to the mortgage constituted a direct assumption and covenant to pay the mortgage debt to the mortgagor, which could be enforced by the trustee for its own benefit; inasmuch as the contract thereby created, if any,was simply to pay the mortgage debt, and this obligation does not carry with it any obligation to perform any of the other covenants of the mortgage.

(a) To determine the question of the effect of such a deed and of the purchase subject to an existing mortgage, it is necessary to ascertain in the first place from the decisions of the Courts what is the relation and what is the obligation which was created as between the mortgagor company and the Penn Company by the acceptance by the latter of the conveyance of said mortgaged property, subject to said mortgage.

(b) Inasmuch as the land affected by the mortgage, deed of trust and the several subsequent deeds, and the subject of the contracts entered into by the respective parties whose rights are the subject of this suit, is in Pennsylvania, where also the suit is brought, the law of that State governs in expounding and enforcing the contract.

Mills vs. Allen, 133 U. S., 423.
Taylor vs. Wood, 135 U. S., 312.
Union L. I. Co. vs. Hanford, 149 U. S., 190.

(c) By some of the decisions of the Supreme Court of Pennsylvania, made before the passage of the Act of June 12th, 1878, hereinafter referred to, it was held that where a mortgagor sells his equity of redemption, and in the deed to his grantee conveyed the property to him subject to the payment of a described mortgage, the acceptance of such a deed was an assumption by the grantee of the mortgage debt, which assumption by the grantee made the debt the grantee's own debt as between him and the grantor, and that upon his failure to pay it when due, an action would lie against him in the name of his grantor for his own benefit or for the use of the mortgagee, or by the mortgagee in his own name, to recover the amount of the mortgage debt, even if the mortgagee had not himself paid the mortgage debt.

Such would seem to be the effect of the decisions, among others, in 3 Watts, 60, Campbell vs. Schrum; Blair vs. Gorman, 5 W. & S., 42; Woodbury's Appeal, 38 Pa., 326.

This doctrine has been somewhat modified by the later decisions in Pennsylvania, namely, Blood vs. Crew Levick Company, 171 Pa., 328, where it is decided that where the mortgagor conveyed his equity of redempton to the purchaser thereof, subject to the lien of the mortgage therein described, the mortgagor cannot maintain any action against his grantee until he has paid the mort-

gage debt or some part thereof, and then only for the part so paid.

The same principle was probably foreshadowed by the Court in Moore's Appeal, 88 Pa., 452-453.

(d) But up to this stage of the argument, without in any way relying upon the last mentioned proposition or upon the effect of the Act of Legislature of June 12th, 1878, and assuming and considering for the time being that the obligation of the Penn Company under the grant to it of the equity of redemption are those set forth in the decisions first above referred to, let us see what effect this ascertainment of said obligations have upon the right asserted by the trustee to a lien upon the insurance moneys.

(e) And in answering this question, counsel also assume and concede for the time being that in Pennsylvania the grant of the equity of redemption of mortgaged property, subject to a described mortgage, has the same legal effect upon the rights of the parties as if the grant was subject to the *payment* of the described mortgage. We do this because, while in other jurisdictions it is held that the conveyance of property subject to a mortgage, without more, imposes no personal obligation upon the grantee to pay the debt, the conveyance of the property mortgaged, subject to the *payment* of the debt, does impose that obligation; and while in all the cases to which we are now referring, the clause in the deed was "subject to the payment of the mortgage," or equiva-

lent words, and while in the case of Kerns vs. Tanner, 13, S. & R., 97, the Court denied that the conveyance of the property with the clause, "subject to the mortgage described," imposed the personal responsibility, yet in the case in 171 Pa., 328, above referred to, the clause was "subject to the lien of the mortgage"; and, moreover, judging from the language used in the opinion of the Court, in the earlier cases to which we are now referring, it would seem that the Court treated the two forms of expression as equivalent.

(f) We assume, then, for the time being, that when the equity of redemption in the property covered by the mortgage of January 1st, 1891, was conveyed by the Penn Company, subject to the $250,000 mortgage, there was an assumption by the latter company of said mortgage debt, which, as between it and the mortgagor company, became the debt of the Penn Company, and that the mortgagee could sue the Penn Company in the name of the mortgagor company, or in its own name, for the mortgage debt when the latter became due.

(3) This being conceded, counsel for defendant submit:

(a) That the implied contract arising from the words, "subject to the mortgage," "subject to the payment of the mortgage," and "subject to the lien of the mortgage," is simply and solely a contract to pay the mortgage debt.

(b) That this implied contract can have no greater or other effect than the express contract to pay the mortgage debt.

(c) That even an express contract to pay the mortgage debt draws with it no obligation to perform any of the covenants of the mortgage;

(d) Except those which run with the land, and these are binding on the purchaser, irrespective of any contract to pay the debt.

(e) That the contract to insure does not run with the land, and therefore the obligation to pay the mortgage debt imposes no obligation to insure.

(4.) It will be thus seen that the implied contract evidenced by the words "subject to the payment of the mortgage debt," or "subject to the mortgage," or "subject to the lien of the mortgage," is simply and solely a contract to pay the amount of the mortgage debt as money and to do nothing else, and this appears from the nature and reasons for the principle that the taking by the grantee of a grant of the equity of redemption in mortgaged property subject to the payment of the mortgage debt.

The reasons and grounds therefor are as follows; as recognized by the decisions of Pennsylvania, namely:

That when the grantor and grantee enter into an arrangement for the sale by the former to the latter of property covered by a mortgage, and agree that it shall be conveyed to the grantee subject to the payment by him of an existing mortgage debt; the amount paid to the grantor by the grantee is only a part of the price agreed upon between them as the purchase price for the property bought, the remainder of said purchase price being the existing mortgage debt; and the vendor virtually sets apart so much of the purchase money as is necessary to pay the mortgage debt, leaving it in the hands of the grantee to be applied to this purpose when the mortgage comes due. But the transaction is, to all intents and purposes, the same in legal effect as if the amount of the mortgage debt had been paid in cash by the grantee to the grantor as part of the purchase money agreed upon as the price of the property at the time of the sale, and applied to the payment of the mortgage. When, therefore, instead of taking from the grantee at the time of the sale the whole purchase money agreed upon as the price of the property, the grantor leaves a part of it in the hands of the grantee to be thereafter applied to the payment of a sum of money for the payment of which the grantor is responsible, there is clearly an implied contract on the part of the grantee that he will apply said portion of the purchase money so left in his hands to the purpose for which he received it and to which he agreed to apply it; and having thus contracted with his grantor, it would operate as a fraud upon the latter if the grantee did not perform his said

contract and apply the money left in his hands as part of the purchase money he agreed to pay for the property, and thus compel the grantor to pay this portion of the purchase money over again, or such part of it as a sale of the land would not produce.

Woodward's Appeal, 38 Pa., 326-327.
Moore's Appeal, 88 Pa., 452-453.
Blood vs. Crew Levick Co., 171 Pa., 328.

It will thus be seen that the implied contract between the vendor of the equity of redemption and his grantee, evidenced by the words, "subject to the payment of the described mortgage debt," grows altogether out of the fact that the amount of the money represented by the mortgage debt is held to have been a part of the purchase money agreed to be paid by the vendee for the property, and which amount was left in the hands of the vendee to be applied to this purpose. It will also be evident from the basis of the contract that the contract on the part of the grantee is simply to pay the mortgage debt in money on the theory that he has in his hands so much money applicable to the mortgage debt.

But the same authorities show (as do the decisions in other jurisdictions which construe the effect of a conveyance of the equity of redemption subject to the payment by the grantee of the mortgage debt) that the implied contract thus made is one made altogether between the grantor of the equity of redemption and his grantee. To this contract the moragagee is no party.

Keller vs. Ashford, 133 U. S., 622 to 625, and cases cited.

The derivative rights of the mortgagee in respect of the contract thus made between the mortgagor vendor and the grantee of the equity, will be treated of presently.

But the rights of the mortgagor vendor, (and of course the derivative rights of the mortgagee), must be measured by the legal extent of the implied contract made by the grantee in accepting a deed of the property subject to the payment of the mortgage debt; and as this contract is founded upon the imputed receipt from the vendor by the vendee of the amount of the mortgage money, the legal extent of the contract is the obligation to pay this amount of money as money to the mortgagor vendor.

In very many cases in the books of assignments of the equity of redemption by the mortgagor, the parties instead of relying upon the implication of a contract on the part of the grantee to pay the mortgage debt derived from a conveyance of the property subject to the payment of the mortgage debt, inserted an express contract for such payment; thus, "subject, however, to the mortgage aforesaid, which said mortgage with the interest due and to become due thereon, the grantee assumes and covenants to pay the amount thereof, forming part of the consideration herein expressed and having been deducted therefrom."

Now, so far as the effect upon the personal responsibility of the vendee is concerned in respect of the mortgage debt, it is just the same, whether arising out of the implied contract derived from the use of the words, "subject to the payment of the mortgage" or arising out of an express contract of the form above given."

Now, in the case of the express contract, it is clearly apparent that all that the vendee has contracted to do is to assume and pay the amount of the mortgage indebtedness; for that is the only and exclusive import of his covenant. And as the implication of contract, from the words above mentioned, "subject to the payment of the mortgage," is an implication of the same contract, which in the other case is expressed in explicit words, it follows, that no other obligation in respect to the mortgage is imposed upon the vendee by the words, "subject to the payment of the mortgage," than is imposed upon the grantee of an equity of redemption, who, in reference to the mortgage debt in express words assumes and covenants to pay the said mortgage debt.

Counsel has heretofore stated that it is generally held that a conveyance of the equity of redemption of the mortgaged property to a grantee with the words, "subject to the described mortgage," and no more, does not impose upon the grantee any personal liability in respect of the mortgage debt. The only effect of such language, according to the decisions generally, is to indicate the extent of the estate which is granted, and thus to show that it is only an equity of redemption that is granted, and that the only right which the mortgagee has for the collection of his debt is the right to make it out of the property mortgaged, or out of the

personal responsibility of the mortgagor upon his covenant in the mortgage.

Elliott vs. Sackett, 108 U. S., 140.
Metropolitan National Bank vs. The St. L. & D. Co., 149 U. S., 447.
1st Jones on Mortgages, Sec. 748.

Wherever this doctrine prevails, it is, of course, perfectly evident that the vendee of the equity of redemption comes under no obligation to the mortgagee, nor to the mortgagor, growing out of the execution of the mortgage or for any of its covenants; and that the only covenants which could affect his ownership of the land would be those which *run with* the land and which would bind him as grantee of the equity of redemption, because, and only because, *they run with the land and were made by his predecessor in title.*

Now, as the only ground upon which it can be held that a grant of the equity of redemption with the clause "subject to the mortgage," described in the grant imposes a personal responsibility upon the grantee is that such a clause is equivalent in import to the clause, *"subject to the payment of the mortgage;"* and, as we have seen that the latter clause is limited, in its legal effect, to an implied contract to pay the amount of the mortgage debt, it is manifest that the clause, *"subject to the mortgage,"* can have, even in Pennsylvania, and under the decisions we are now considering, no greater effect.

And as the only way in which a grantee of the equity of redemption becomes liable to the mortgagor vendor, even to pay the mortgage debt, is by virtue of some provision in the deed of grant which expressly or impliedly is an assumption on his part of the obligation to pay it, it is very certain that, *without a contract, express or implied*, he does not become responsible for any of the other covenants or obligations which the mortgagor has seen fit to enter into with the mortgagee, excepting those running with the land and which latter the law itself imposes For certainly it could never be held that the vendee of the equity of redemption intended, without a contract express or implied to that effect, to become responsible to the mortgagor in respect of his covenants with the mortgagee in matters of subordinate and minor importance to the payment of the mortgage debt, when it is held that he only becomes responsible to the mortgagor for the payment of the mortgage debt when he has made a contract, express or implied, to become responsible therefor.

It follows from the foregoing that unless the covenant, or contract rather, contained in the mortgage on the part of the mortgagor company upon the demand of the trustee to insure the property for the benefit of the mortgagee, if a covenant running with the land, and for this reason binding upon the Penn Company, it never came under any obligation to the mortgagor company to insure the said property for the benefit of the mortgagee, even upon the assumption which we are now making that, under the law in Pennsylvania at the time the deed to the Penn Company was made, the vendee of an equity of redemption in mortgaged property who takes under a deed which declares that the grant is made subject to the described mortgage, thereby assumed as his own the

mortgage debt, and became liable to an action therefore by the mortgagor, or by the mortgagee, and before payment of the mortgage debt by the mortgagor.

PROPOSITION NUMBER FIVE.

But independently of all the foregoing, we submit that the provision in the deed of mortgage on the subject of the insurance is not a covenant upon the part of the mortgagor to insure for the benefit of the mortgagee.

There is no covenant in the mortgage which obliges the mortgagor to insure for the benefit of bondholders, and therefore of necessity no provision obliging the Penn Company, its grantee, to do so, because:

1. Even if the provision in the mortgage relating to insurance does amount to a covenant to insure, it does not provide that such insurance shall be for the benefit of the trustee or bondholders. If such a covenant under the authorities does not imply a covenant to insure for the benefit of bondholders, the trustee can have no claim to insurance taken out by the Penn Company for its own benefit.

The only provision relating to insurance contained in the mortgage is the following clause which is found in Article X of the mortgage, (record p.....):

"It shall be no part of the duty of the party of the "second part (the trustee) to file or record this Inden- "ture as a mortgage or a conveyance of real estate or "as a chattel mortgage or to renew such mortgage or "to procure any further or additional instrument of "further assurance, or to do any other act which may "be suitable or proper to be done for the continuance "of the lien hereof, or for giving notice of the existence " of such lien or for extending or supplementing the "same; *nor shall it be any part of its duty to effect in- "surance against fire or other damage on any portion "of the mortgaged property or to renew any policies "of insurance or to keep itself informed or advised as "to the payment of any taxes or assessments or to re- "quire such payment to be made; but the trustee may, in its discretion,do any or all of the matters and things "in this paragraph set forth, or require the same to be "done."*

It is obvious that there is no requirement in this clause that any insurance taken out in response to a demand by the trustee, shall be for the benefit of the trustee or its cestui que trust, or that it shall be applied to the restoration of the morgaged premises in case of loss or in discharge of the mortgage debt.

This being so, the foregoing clause cannot, as a matter of law, be interpreted so as to construe that covenant to mean that any insurance taken out should be for the benefit of the trustee.

This was expressly decided in the case of Lee vs. Whitely, Law Reports, 2nd Equity, p. 143.

This was a suit seeking a declaration by the Court that the plaintiff was entitled to money payable on a policy of insurance effected by the defendant on certain machinery or to so much thereof as would be sufficient to satisfy the amount due him on the security of the bill of sale.

The defendants had assigned certain machinery by bill of sale to secure a sum of money advanced by the plaintiff. The deed contained a covenant to insure, but no provision for the application of the insurance moneys in case of fire in liquidation of the mortgage debt, or that the insurance so to be effected was to be for the benefit of the mortgagee. The defendant did effect insurance in his own name; the property was destroyed by fire, and thereupon the plaintiff sought to recover the insurance money by virtue of the covenant to insure.

The Court held, per Kindersley, V. C., that the plaintiff had no right to the insurance moneys on the ground that there was no covenant that the insurance to be effected should be for the benefit of the mortgagee, and the opinion of the Court on that subject is as follows:

"Upon the covenant to insure, the question arises "whether the machinery, having been destroyed by "fire, the plaintiff is entitled to have the money secured "by the policy applied in payment of the debt due to "him.

"At first sight it would seem consistent with natural "justice that the plaintiff should have that right; and "the question naturally occurs, why the covenant to in-

"sure should have been required by the plaintiff if it "was not intended that he should have the benefit of "the insurance; and the case before Lord St. Leonards "of Garden vs. Ingram has been cited, in which a ques- "tion of somewhat the same kind was decided in favor "of the mortgagee; but that case differs very mater- "ially in the principle on which it was decided from "the present. In that case the lease contained a cove- "nant that the premises should be insured in the names "of the lessor and lessee, and that the moneys secured "by the policy should be applied in restoring the prem- "ises. The lessee mortgaged his lease, but the mort- "gage contained no mention of the insurance, though "the lease was referred to in the recitals. The prem- "ises having been destroyed by fire, the mortgagee re- "stored them without waiting to get the money due "on the policy; and on a claim filed by the mortgagee, "the mortgagor was decreed to deliver up the policy "and join with the lessor in signing the receipt to the "insurance office, to enable the mortgagee to receive "the money payable under the policy.

"But the present is not the case of the mortgage "of premises on which there was a policy existing at "the time of the mortgage, nor is there here a covenant "that the policy money shall be applied in restoring "the premises; but it is merely an assignment by bill "of sale of machinery, containing a covenant to insure "and it would be impossible to hold, as was done in "the case of Garden vs .Ingram, that the benefit of "the policy passed by the assignment, as the policy at "at the time did not exist. It appears to me that that "case does not govern the present, and that if the plain- "tiff's contention can be sustained, it must stand on

"the footing that by reason of the covenant to in-
"sure there is an implied contract with the mortgagee
"that the policy moneys should be applied in liquida-
"tion of the mortgage debt.

"The question then comes to this: Can I imply
"such a covenant from the language of the bill of
"sale" and on examination of the terms of the instru-
"ment, I am of the opinion that I cannot. Were I to
"do so I should be making a new contract between the
"parties. It was perfectly competent to the plaintiff
"to have stipulated that the policy moneys should be
"applied in liquidation of the mortgage debt or in the
"restoration of the premises, but he has not done so;
"and how can I say that the parties intended some-
"thing which is not stipulate in this instrument or
"make for the plaintiff a better agreement than he
"thought it necessary to make for himself. It might
"be that if he had insisted on such a contract, Messrs.
"Whitely would have refused it.

"In point of fact, the existence of the insurance is
"obviously to some extent for the benefit of the mort-
"gagee, although there was no obligation on the mort-
"gagor to apply the insurance moneys in any particu-
"lar way; because it is for the interest of the mortgagee
"that his mortgagors should be in a solvent condition,
"and that, in case their property should be destroyed
"by fire, they should still have the means of paying the
"mortgage debt."

This case is referred to and its doctrine upheld as good law in 1st Jones on Mortgages, Sec. 401; and also in 1st

Pingree on Mortgages, Sec. 553, which comes down to 1893 and quotes the above as good law and sustains the above doctrine.

It will therefore be seen that if this be the law there was nothing in the mortgage which obliged even the mortgagor to insure for the benefit of the trustee of its centuis que trustent.

It results from the foregoing that the Penn Company has never come into such contractual relations with the mortgagor company or the mortgagee as entitles the latter to any part of the insurance money receivd from the insurance policies in exisence at the time of the re.

ESTOPPEL.

1. There is nothing in the conduct of the Penn Company which upon principles of estoppel entitle the mortgagee to claim any part of the insurance money.

The court below has further assumed in its findings as hereinbefore pointed out that it would be inequitable to award this fund to the Penn Plate Glass Company because **"it had only paid $83,000 for the property and had insured it for over 300,000, and on the de-**

struction of the property, which was the substantial security for $250,000, it seeks to avoid the payment of the $250,000 (representing the deferred purchase money) and to realize on the $83,000 paid by it upwards of $300,000 in insurance upon property for which it never paid."

There is absolutely no basis of fact or law for this finding.

As a matter of fact the Penn Company insured only *its own equity of redemption* as it had a right to do and not the interest of the bondholders. Both the Penn Plate Glass Company and the trustee had a right to insure their respective interests up to the full value of the property as will be more fully demonstrated later.

Stinson vs. Insurance Co., 103 U. S., p. 25.
1st Jones on Mortgages, Sec. 397.
Louden vs. Waddle, 242 Pa.

Furthermore, the insurance placed by the Penn Company was only the fair value of its own interest, because in addition to the $83,000 which it paid for the property, it virtually rebuilt the plant at a cost of $200,000 for betterments and improvements, and the attention of the court is called to the following undisputed and uncontradicted testimony of W. L. Kann, (Record, pp. 475 and 476).

"Q. At the time of this sale you were a judgment creditor, were you not, of the company?

"A. Yes, sir, I was.

"Q. Mr. Kann, I wish you would state what additions or improvements or betterments you or the Penn Plate Glass Company have put upon this property since the sale to you?

'A. During the time I had owned the property myself, and afterwards when it came into the possession of the Penn Plate Glass Company, up to three or four months ago, we have spent about one hundred and eighty-five to two hundred thousand dollars on the property.

"Q. In what way?

"A. For betterments, additions, constructing of a water plant, the erection of a gas plant and adding thereto of additional machinery in order to complete the plant, had to buy additional ground in order to put these constructions on. When I obtained possession of the property, I found that it was in an incomplete state and not capable of producing anything like the amount of product which they have claimed it would. In fact it couldn't be operated at all in the way that it was then constructed. Not enough finishing machinery, wasn't enough boiler capacity nor engine capacity, the natural gas had given out and no provisions had been made to use fuel in the plant. When we attempted to burn crude oil, the insurance companies wouldn't insure the property if we continued it, and I was put to the necessitv of putting in a fuel plant.

"Q. What did it cost you?

"A. Well the gas plant cost, I suppose, in the neighborhood of $25,000, probably more than that, but at least $25,000. I have got the items.

"Q. I wish you would specify if you can and describe definitely the permanent structures or betterments

that you put upon the land which were not there at the time of the receiver's sale.

"A. I started to construct, and have since completed, a water plant. The plant required a great deal of water in its operation, and the only source of supply was the local company there which wouldn't guarantee them a supply at all, and what they did at a very high price, and several times in the history of the company before I got hold of it they had to shut down entirely for want of water. One of the first things I did was to construct a water plant. That plant cost in the neighborhood of $40,000; and as I stated before, in regard to the fuel, fuel was a very large item there. In fact, the plant couldn't operate without having a fuel of some kind.

"Q. What was the nature of it?

"A. Manufactured gas, called a producer gas plant. It manufactured gas out of coal.

"Q. Can you give approximately the value of that?

"A. The plant itself cost somewhere in the neighborhood of $25,000. It and its attachments into the building would cost all of $50,000. We had put on additional boilers. There wasn't sufficient boiler capacity there to run the plant. We put on an addition to the casting hall. That is the part of the plant in which you cast the glass, both in buildings and in the kilns. I had to reconstruct all the furnaces as they had been built for natural gas, and natural gas had all given out and we had to put in fuel furnaces. We put in one-third increase in the polishing machines and about one-third increase in the grinding machines. Had to put new roofs over most all the buildings, railroad switches, in order to handle our material, etc.

"Q. Then in general what is the cost and value of the improvements and permanent betterments which you placed upon that property after the sale to you?

"A. About $200,000."

Fourth. **The position of the Court below in concluding that because it could have ordered the Penn Company to insure for the benefit of the trustee at the time of the application for a Receiver, it could two years thereafter and after the destruction of the property by fire, impress a lien on insurance that had been taken out by the Penn Company, for its own benefit prior to that application, is evidently wrong.** . . . . . .

Assuming that the Court could have made the order at that time, which is denied, the Penn Company could have insured its own interest and also the interest of the mortgagee too. The Court did not make that order, and therefore the Penn Company did not insure the interest of the mortgagee, as it could have done, in addition to its own, and is now called upon to give up its own insurance to the trustee. The positions of the parties have changed and the result is inequitable.

Counsel, therefore, contend that they have demonstrated that the findings of fact made by the Court in regard to estoppel are unsupported by any evidence, and therefore claim in conclusion on this branch of the case:

Fifth. **That the trustee under the mortgage has no claim on this fund growing out of any estoppel founded on the contract of the Penn Plate Glass Company.**

In this connection counsel call the attention of the Court by way of resume to the following propositions and conditions:

1. The Penn Company is a corporation, legally formed, and acquired the mortgaged property in due form, and has never in any way come under any obligations in writing other than the obligations created by the acceptance of the deed of the equity of redemption in the property, nor had it in any way done anything to give the trustee any claim upon the insurance money if the acceptance of the deed did not give that right.

2. The principles of equitable estoppel are, of course, perfectly familiar.

In order to create such an estoppel as will prevent a party from asserting his legal rights to property, there must be some intended deception in the contract or declarations of the party or such gross negligence on his part as to amount to constructive fraud.

Brant vs. Virginia C. & I. Co., 93, U. S., 326.

Henshaw vs. Bissell, 18 Wallace 255.

When the condition of the title is known to both parties or both have the same means of ascertaining the truth there is no equitable estoppel.

93 U. S., 326.

Where one by his words or conduct causes another to believe the existence of a certain state of things and in-

duces him to act on that belief so as to alter his previous position, the former is concluded from averring against the latter the different state of things as existing at the same time.

Lord Denman in Pickards vs. Sears, 6 Ad. & E. 11, 469.

So far from any conduct of the Penn Company coming within any of these descriptions of the conduct out of which arises an equitable estoppel in reference to the insurance of the insured property, the facts hereinabove set forth show conclusively that the trustee for three years and more was fully aware that the Penn Company, as well as its grantor, W. L. Kann, denied that there was any obligation on the part of the grantees of the equity of redemption in the mortgaged property to insure for the benefit of the mortgagee, and that no such insurance was or would be effected. The trustee, therefore, allowed the buildings and plant to remain uninsured on behalf of the mortgage and the bonds secured thereby during all this time—that is to say, for about three years before the fire, with full knowledge of the fact that the property was not insured for the benefit of the bondholders, that it would not be, and that the insurance existing thereon was entirely for the benefit of the Penn Plate Glass Company.

It was entirely within the power of the trustee to insure the property for the benefit of its cestuis que trustent and to the full value of the mortgage, notwithstanding the fact that the property was already insured to the amount to which it was insured for the benefit of the

Penn Company, and it was the duty of the trustee under the mortgage to have notified the bondholders that the mortgagor company had not insured for their benefit at the time mentioned, and that the assignees of the equity of redemption, denying their obligation to insure, had refused to insure for the benefit of the mortgagee. If the mortgagee bondholders refused to advance the trustee money enough to affect the insurance, the trustee could have advanced it and it would have been payable out of the proceeds of the sale of the mortgaged property, and with insurance there could have been no possibility of any loss to the trustee. It could also have insured and charged the premium to the Penn Company if it were the duty of that company to insure. But at all events, the failure to insure for the benefit of the mortgage was the fault either of the trustee or the bondholders, after the failure of the mortgagor company to insure, and the refusal of the Penn Plate Glass Company and Kann so to do. Therefore, for any loss which may result to the bondholders because of the non-insurance of their property for their interest and protection, neither Mr. Kann nor the Penn Company are to blame.

It is unjust and inequitable to hold the insurance which the Penn Plate Glass Company had affected for its own benefit, when the trustee, with full knowledge of the facts, could have insured itself. Such is not the proper measure of damage for a breach of the covenant to insure, even if the Penn Company were bound to do so. The utmost liability of the Penn Company, taking into account the full knowledge and notice to the trustee of its refusal to insure, would be the cost of maintaining insurance.

The case would be very different if the Penn Company had secretly taken out insurance for its own benefit and allowed the trustee to rest under the assumption that it had insured for the benefit of the bondholders.

Sixth. **It is of course well settled that the Penn Company had by virtue of the ownership of the equity of redemption in the buildings and plant which were the subject of the insurance, an insurable interest equal to the entire insurable value of the insured property, although said company was not personally liable for the mortgage debt.**

Stinson vs. The Ins. Co., 103 U. S., page 25.
First Jones on Mortgages, Sec. 397.

The attention of the Court is called particularly to the case of the insurance company against Stinson. There the plaintiff had a contract to build a hotel for $25,000 and had nearly completed it, when, failing to get his payments from the owner, he filed a mechanic's lien against the building and began action on that lien. Whilst the action was pending, he insured the property with the defendants, the insurance company, for $5,000, the policy stating his interest to be that of contractor and builder. There was a mortgage of $17,000 on the property which was prior to the mechanic's lien, and when the property burnt the insurance company contended by way of defense that the plaintiff had no insurable interest because the property, when insured, was not worth more than the amount of the mortgage of $17,000 which was prior to the plaintiff's lien. Justice Bradley delivered the opinion of the Court, and says, inter alia, on page 28 et seq.:

"As to the other question, relating to the insur-
"able interest of the plaintiff, we think that the
"charge given was equally free from exception.
"There is no doubt that the owner of property had
"an insurable interest to the extent of the value of
"the building, notwithstanding the existence of a
"mortgage on the property of sufficient amount to
"absorb it. Leading authorities on the point may be
"found cited in May on Insurance, sects. 81, 82. The
"remarks of Mr. Chief Justice Marshall, in delivering
"the opinion of the Court in Columbian Insurance
"Co. vs. Lawrence (2 Pet. 25), are apposite and illus-
"trative. The assured in that case, though in posses-
"sion, had only a contract for the purchase of the
"property, subject to a condition which had not been
"complied with, but of which the vendor had taken
"no advantage at the time of effecting the insurance,
"or at the time of the loss. The Chief Justice says:

" 'That an equitable interest may be insured is ad-
"mitted. We can perceive no reason which excludes
"an interest held under an executory contract. While
"the contract subsists, the person claiming under it
"has undoubtedly a substantial interest in the prop-
"erty. If it be destroyed, the loss in contemplation
"of law is his. If the purchase-money be paid, it is
"his in fact. If he owes the purchase-money, the
"property is its equivalent, and is still valuable to
"him. The embarrassment of his affairs may be such
"that his debts may absorb all his property; but this
"circumstance has never been considered as proving
"a want of interest in it. The destruction of the prop-
"erty is a real loss to the person in possession, who
"claims the title under an executory contract, and the
"contingency that his title may be defeated by subse-

"quent events does not prevent this loss.

"The principle asserted in these remarks, as well "as the reason of the thing, leads to the conclusion, "that the owner of an equity of redemption has an "insurable interest equal to the value of the insurable "property embraced therein, whether he is personally "liable for the mortgage debt or not. His interest "arises from his ownership, carrying with it the inci- "dental right of redeeming the property from the en- "cumbrances on it. If he is also personally liable for "such incumbrances, it only makes his interest more "direct and exacting."

The same principle is upheld in the Pennsylvania case of Loudan vs. Waddles, 98, Pa., p. 242.

Along with this right of the Penn Company as owner of the equity of redemption to insure for its own protection alone the buildings and plant to the full insurable value, there existed the right of the trustee and of its *cestuis que* trustent to insure for their own protection the same buildings and plant to the amount of the mortgage, provided the insurable value of the property in the buildings and plant were equal to the mortgage debt, and upon the destruction of the buildings and plant, the owner of the equity of redemption and the mortgage could each recover the full amount of its insurance.

Stinson vs. Ins. Co. above cited, 103 U. S., p. 25.

The Penn Plate Glass Company, then, having this right, insured the property only for the protection of its own interest, and therefore the whole insurance money belongs to it as the owner of the equity of redemption, notwithstanding the existence of the $250,000 mortgage, unless the bare purchase by it subject to the mortgage created a duty on its part to insure for the benefit of the bondholders, Counsel for defendant are left free to discuss this question unaffected by any surrounding facts or circumstances in the way of equitable estoppel, and with no pretense of any contract, express or implied, between the Penn Plate Glass Company and the mortgager or the trust company, except that arising from the bare acceptance of the deed conveying the equity of redemption in the mortgaged property, and to this question they will now proceed to address themselves.

2. It is shown by the allegations of the mortgage trustee as made in its supplemental bill:

(a) That the fire occurred in April, 1898:

(b) That while Kann owned the property (from July, 1894, to July, 1895), the mortgage trustee demanded of him insurance for the benefit of the mortgagee, and that he denied his obligation so to insure, and informed the trustee that he had not insured and that the trustee knew he had not so insured while he held the property:

(c) That upon the purchase by the Penn Company, a similar demand and a similar refusal were made; and

that the trustee knew when he filed the bill for foreclosure in July, 1896, that the Penn Company had not insured for the benefit of the mortgagee.

(d) That upon the filing of the bill in 1896, the Penn Company still denied its obligation to insure; and from that time to the fire the trustee and the bondholders omitted to insure, and *chose to rely* on the bond of Kann and Wertheimer, which, while reiterating their denial of any obligation of the Penn Company to insure for the benefit of the mortgagee, only covenanted, *if said obligation existed,* to appropriate out of insurance affected by the Penn Company, sufficient to pay the bonds

(e) That the insurances severally affected by Kann and the Penn Company upon the latter of which the trustee now claims a lien for the benefit of the bondholders, were effected for the protection alone of the estate and interest of Kann, while owner, and afterwards of the Penn Company, the respective owners of the equity of redemption; ***and it was expressly declared on the face of the policies that said insurance did not cover the interest of the bondholders.***

(f) That these insurances were placed at the time of the respective purchases of the property by Kann and by the Penn Plate Glass Company and were maintained by Kann and afterwards by the Penn Company until the fire; that this latter is the insurance in question; it was not placed *after* the application for a Receiver, but long *prior* to the filing of the original bill, and was in existence at the time of the application for the Receiver and of the alleged agreement of the Penn Company to insure as found by the Court.

(g) That from a time shortly after Kann purchased the property in June or July, 1894, up until the occurrence of the fire, the trustee knew and was notified repeatedly—1st, that both Kann and the Penn Company denied that there was any duty on them to insure for the protecion of the interests of the bondholders; and, 2d, it knew that no insurance of that character existed, and that this knowledge existed during that whole period.

(h) That the Penn Plate Glass Company never agreed at the time of the application for a Receiver or at any other time to insure for the benefit of the Trustee, if it should be held it was bund to do so, nor did it ever place any insurance subsequent to that time or in pursuance of the promise.

But as a matter of fact Kann and Wertheimer did give their individual and personal guarantee that *out of the insurance existing at that time and which had been previously taken out by the Penn Company as above set forth,* there should be set aside sufficient to pay all valid outstanding bonds, *if it should be finally judicially decided that the trustee was entitled to an equitable lien on that existing fund.*

(i) That Kann and the Penn Company on their several acquisitions of the property, put betterments thereon to the extent of two or three hundred thousand dollars—practically rebuilt the plant, and the insurance placed by them fairly represented the value of their equity of redemption which was alone insured, exclu-

sive of the mortgage debt, and therefore there is no ground for the assertion of the Court that if the fund should be awarded to the Penn Company, it would be so much purely speculative gain.

Therefore counsel for defendants, leaving for the present the questions of law raised by the Court as to the effect of the purchase by the Penn Company subject to the mortgage, will address themselves to the various findings of fact upon which the Court has based its idea of an equitable estoppel; and of course, if they can convince the Court that the same are erroneous, the reasoning and conclusion of the Court below based thereon must fall to the ground.

The findings of fact which counsel claim to be erroneous and the reasons therefor are as follows:

First. The Court finds as a fact that Pennsylvania Plate Glass Company, the mortgagor, had originally insured for the benefit of the Trustee, and that upon its insolvency this insurance had been kept up by Joseph W. Stoner, the Receiver, under the order of the Court of Westmoreland county during his receivership, and that:

"These policies were in force when Kann pur-
"chased and the proofs show that they were turned
"over to him and he was informed by the Receiver

"that they were in existence and were by him al-
"lowed to lapse."

Opinion of Court Below, Record p.....

This is directly in contradiction to the testimony of Jos. W. Stoner, the Receiver, the only witness on the subject who denied that the policies were turned over to Kann.

Stoner testifies as follows, as a witness on behalf of complainant:

"Q. And did you keep it up (the insurance) as
"Receiver?
"A. Yes, sir.
"Q. And then, of course, when you sold the
"property you thought you were done with it.
"A. *I stopped paying any more money and allowed "the policies to lapse.*
"Q. * * * When you sold this property you
"turned the policies over to Mr. Kann? Is that true
"or not?
"A. No, sir.
"Q. You didn't do anything of the kind?
"A. *I did not.*
"Q. And you simply allowed whatever policies
"the company had taken out, or you had taken out,
"to lapse?
"A. Yes, sir; that is my recollection now.
"Q. But whatever you had, whether they had
"lapsed or not, you delivered over as a *matter of*

"fact to Mr. Kann when he became the purchaser at "Receiver's sale?

"A. No, sir.

Record p. 77.

"Q. What did you do with them?

"A. I had them stored in the proper safes in the "factory. It became necessary to remove and take "the books out of the factory when operations were "instituted by the new corporation, and I boxed them "carefully and shipped them in here and stored them.

Ib. p. 78.

This is the testimony of plaintiff's own witness and comprises all there is on the subject; but at all events it must be perfectly evident that the insurable interest of the mortgagor and the receiver ceased on the sale to Kann and therefore the policies must have lapsed of themselves and could not have been in force in Kann's hands.

In addition, the counsel for defendant merely point out that Kann *could not have allowed these policies to lapse unknown to the trustee.* This will be demonstrated hereafter when counsel come to consider the evidence showing that the trustee had full knowledge of the fact that both Kann and the Penn Company continuously refused to insure for the benefit of bondholders

Second. The Court below has further made findings of fact from which it implies all the way through, not only that Kann secretly allowed the foregoing insurance to lapse, but that the insurance fund upon which the Court has impressed an equitable lien in favor of complainant *was not taken out until the complainants made a motion for a Receiver for* the mortgaged premises at the time of the original bill, and that such insurance was taken out subsequently thereto under a promise alleged to have been made by the Penn Plate Glass Company to do so if it should be judicially determined that it was bound to insure for the benefit of the trustee; and that in the insurance so taken out the Penn Plate Glass Company had surreptitiously and without the knowledge of the court or trustee placed a provision in the policies totally excluding any interest of the bondholders therein.

This is a total misconception on the part of the Court and is unjustified by the allegations of the pleadings, the admitted facts or any testimony in the case.

The findings of the Court on this subject are as follows:

(*a*) "That on the filing of the bill, the trustee "moved for a Reeeiver to take possession. The "plant was being operated by the Penn Plate Glass "Company, a large number of persons employed, the "issues of the case and the legal rights of the parties "not determined. In this aspect of the case, and the "Court being satisfied that a Receiver could not ope-"rate the works, it declined to appoint a Receiver."

See Opinion p.....

(*b*) "That the question of insurance arose during "the pendency of the application for a Receiver, and "thereupon counsel for W. L. Kann and the Penn "Plate Glass Company signified their willingness to "place insurance upon the property for the benefit of "the trustee *if they were bound to do so, but denied "their liability to do so.*

"That subsequently they did place a large amount "of insurance upon the property, (Opinion Record "p. .....) and this insurance was placed by a party "to this litigation under the stress of an application "for the appointment of a Receiver and a consequent "exclusion from possession. (Ib. p. .....)

In pursuance of that agreement and in response "to a demand upon these parties to insure made by "counsel for the trustee at the time of the applica- "tion for a receiver."

(c) "That this agreement to insure was in the "form of a guaranty, 'signed by W. L. Kann (the "president of the company) and Emanuel Wert- "heimer (a stockholder) and filed in Court during "the pendency of the motion aforesaid,' con- "ditioned in the event of a loss by fire of the "property described in the said Pennsylvania "Plate Glass Company mortgage, that then there "should be paid to the Farmers' Loan & Trust "Company in trust for the holders of the valid "bonds secured by the mortgage, a sum equal to

"the total amount of such valid bonds out of the "policies of insurance existing in favor of the "Penn Plate Glass Company, *provided that it shall "have been finally adjudicated that the Penn Plate "Glass Company, the present owner of said property, "is bound or liable by anything contained in said "mortgage or the terms of its purchase of the de- "scribed mortgaged premises to keep or maintain in- "surance for the benefit of holders of the bonds se- "cured by the said mortgage;* and it is further pro- "vided that in the event of a loss by fire and the in- "surance money in that event is applied to the "restoration of the plant of the Penn Plate Glass "Company, bound by said mortgage, that then this "obligation should be null and void without preju- "dice to the right of the Penn Plate Glass Company, "its successors and assigns, to deny its liability to "take out, keep and maintain policies of insurance "on the said plant at any time for the benefit of the "holders of valid bonds secured by the mortgage;

"And it is further distinctly understood and "agreed that in the event of partial losses and par- "tial restoration, the amount of the insurance money "applied thereto shall be a credit to the account "for which we have become bound."

(d) "That after the loss, it appeared in the in- "surance placed that the Penn Plate Glass Com- "pany and W. L. Kann, its president, had placed "a provision therein in terms excluding the bond- "holders from any interest in the policies; that

"this was an act inter alios acta, the trustee and "Court had no knowledge of it, and it can in no "way effect the legal or equitable status and rights "of the parties before the Court."

It will be apparent at once from the foregoing findings of fact that the Court below proceeds on the assumption that the Penn Plate Glass Company at the time of the application for a Receiver, had agreed to place insurance for the benefit of the trustee, subject only to the bare question as to whether or not it was bound under the terms of its purchase, subject to the mortgage and the terms of the mortgage, to so insure, and notwithstanding this agreement, had surreptitiously placed a provision in the policies excluding the trustee from any participation therein.

It will be seen that this assumption is vastly important to defendants, inasmuch as it deprives the Penn Company of the legal advantage arising from the fact that the insurance was insurance *previously* placed for its own benefit with full notice to the trustee that it was for its own benefit and not for the benefit of the trustee at all.

Not only is there absolutely no evidence to justify this assumption of the Court, but every fact and all the pleadings in the case show the contrary. The true state of facts is as follows:

(a) That immediately upon Kann's purchase of the

property at Receiver's sale and upon his taking possession of it in July, 1894, the trustee notified Kann as owner of the property to insure for the benefit of bondholders, and that he distinctly denied any duty on his part to do so and so notified the trustee. This is conclusively shown by the allegations of complainant's own bill in Paragraph 19 on page 16 of the record where the averments are as follows:

> "And your orator further alleges that, after "said Kann had purchased said mortgaged prop- "erty for the said sum of $37.500 or thereabouts "and had become the owner thereof subject to "the mortgage * * * * he recognized the "validity of the mortgage and bonds secured "thereby and paid interest thereon, *and although "your orator persistently demanded of said Kahn "that he carry out the terms and provisions of said "mortgage concerning insurance and demanded that "he preserve the insurance already affected as afore- "said, and that he affect further insurance for the "benefit of your orator as such trustee of said bond- "holders, nevertheless said Kann positively and de- "liberately refused to preserve the existing insurance "or to affect new insurance for the benefit of your "orator as such trustee or of said bondholders, and "intentionally allowed the said existing insurance "(namely the insurance affected by the Pennsylvania "Plate Glass Company and its Receiver) to lapse and "be cancelled."*

Complainants further allege in the same paragraph that they knew that this refusal to insure by Kann still existed at the time he sold the property to the Penn Plate Glass Company. That averment is as follows:

> "Said breach was in existence at the time when "said Kann organized the defendant Penn Plate "Glass Company for the purpose of operating said "place and sold said property to said new company "as aforesaid, and said breach was known to said "Penn Plate Glass Company at the time of its said "purchase and has been known to said company ever "since and still continues."

It is, therefore, incontestable that the trustee knew that Kann refused to insure, and that there was no insurance on this property for the benefit of the bondholders from the time Kann purchased, in July, 1894, up to the time of the purchase by the Penn Plate Glass Company, in July, 1895.

It is equally incontestable that from the acquisition of the property by the Penn Company in July, 1895, up to the time of the fire in April, 1898, the trustee knew:

(a) That the Penn Plate Glass Company had not insured for the benefit of the trustee or bondholders.

(b) That during that period and prior to the filing of the original bill in 1896, and the application for the

Receiver, the Penn Company had taken out insurance for its own benefit, and that this insurance was then in existence and was the fund upon which the trustee claimed a lien in its supplemental bill.

This appears from the following:

On November 29th, 1895, several months after the Penn Company had become the owner of the mortgaged property, the trustee notified the Penn Plate Glass Company, the Pennsylvania Plate Glass Company and Kann, to insure for the benefit of the trustee.

This is a fact found by the Court.

Opinion Record, p. .....

The trustee, therefore, must have known that up to this time, November 29th, 1895, over a year before the original bill was filed, that the Penn Company had not insured for the benefit of the bondholders of the trustee.

The complainant further avers in its supplemental bill:

(a) That on or about July 8th, 1896, being the time the original bill was filed, it moved for the appointment of a Receiver, and that this motion was refused by the Court.

(b) That as a ground for the appointment of a Receiver, the trustee urged the previous refusal of the Penn Company and Kann to insure for the protection of the bondholders, and a lack of any protection at that time by way of insurance in case of fire

(c) That the Penn Company at that time had previously taken out policies covering its property to the amount of $450,000.

(d) That,

"In answer to its said insistence concerning "the insurance of its interest as trustee, Kann and "the Penn Plate Glass Company continued to "maintain an attitude of refusal to effect such in- "surance in spite of complainant's demands, but "that Kann and one Wertheimer filed in Court a "bond whereby they individually guaranteed that "out of the above mentioned policies so prev- "iously taken out by the Penn Company and "then existing, there should be paid to complain- "ant, trustee for bondholders, a sum equal to the "total amount of valid bonds, *provided that it should "be finally adjudicated that the Penn Plate Glass "Company was bound or liable by anything contained "in said mortgage or the terms of its purchase, to "keep or maintain insurance for the benefit of the "holders of bonds secured by the mortgage.*"

These recitals will be found in paragraph XVI. and XVII. of the supplemental bill, supplemental record pages 17 and 18 and are literally as follows:

"XVI. Your orator further alleges that this case "was begun on or about the 8th day of July, 1896; "that immediately after your orator made a mo- "tion before this Honorable Court for the appoint- "ment of a Receiver herein to take possession of "the said mortgaged property pending the decision "of this cause; that one of the chief grounds of "your orator's said motion was to obtain a means "for affecting and providing insurance of its inter- "ests as such trustee and of the interest of said "bondholders, in view of the refusal to effect such "insurance hereinbefore set forth; that the said de- "fendants, Kann and the Penn Plate Glass Com- "pany, were both before this Honorable Court on "said motion, and opposed said motion and suc- "ceeded in obtaining a ruling of this Court adverse "to your orator and the denial of your orator's said "motion. And your orator further alleges that in "answer to its said insistence concerning the insur- "ance of its interests, as a trustee, and of those of "the said bondholders, said defendants Kann and "the Penn Plate Glass Company continued to main- "tain their attitude of refusal to effect such insur- "ance in spite of the demands of your orator, and "procured to be filed in this Court a certain bond "whereby said Kann and one Emanuel Wertheimer "covenanted to pay to your orator, as such trustee "for the holders of said bonds in case of loss, a sum "equal to the total amount of such of said bonds as "might be valid, out of certain policies of insurance "then existing in favor of the said Penn Plate Glass "Company, being the policies hereinafter referred "to, provided that it should be finally adjudicated "that the said Penn Plate Glass Company was "bound or liable by anything contained in said mort-

"gage, or the terms of its purchase of said mort-
"gaged property, to keep and maintain insurance
"for the benefit of the holders of bonds secured by
"said mortgage."

"XVII. Your orator further alleges on informa-
"tion and belief, that the Penn Plate Glass Com-
"pany has taken out policies of insurance covering
"respectively said mortgaged property, or a part
"thereof, with all of the Insurance Companies made
"by this bill parties to this cause, being all of the
"defendants hereto other than the said defendants
"Pennsylvania Plate Glass Company, Kann and
"Penn Plate Glass Company, and that said policies
"amount in the aggregate to $450,000 or thereabouts,
"and constitute legal and valid obligations on the
"part of said defendant insurance companies; but
"your orator is not informed as to, and cannot there-
"fore allege, the amounts of the respective policies."

It will, therefore, be seen that the policies mentioned in the XVI. paragraph, being the "policies hereinafter referred to and then in existence" are the same policies mentioned in paragraph XVII.

But in addition to the foregoing, the defendants, Kann and the Penn Plate Glass Company, in their answer to the supplemental bill, distinctly aver and admit:

"That long before the original bill was filed in
"this case, they gave distinct, repeated and writ-
"ten notices to the said plaintiff that they were

"not bound to insure said premises for the bene-
"fit of the plaintiff and that they would not nor
"would either of them insure said premises for the
"benefit of the plaintiff as trustee or of the bond-
"holders secured by said mortgage to the end that
"said plaintiff as trustee and the said bondholders
"should protect themselves under said notice by in-
"surance of their respective interests."

Defendant's Answer, Paragraph 14, Record p. 12.

The foregoing allegations of the bill and the admissions of the answers were offered in evidence by complainant.

See Supplemental Record, pp. 51, 52 and 53.

The foregoing averment of the answer stands as evidence, being responsive to the bill.

In addition the attention of the Court is called to the following testimony of Mr. J. S. Ferguson, of counsel for the complainants:

"Q. Mr. Ferguson, your firm is associated with
"the firm of Turner, McClure & Ralston as attor-
"neys for the plaintiff in this case?

"A. Yes, sir.

"Q. You have had professional charge of this
"case?

"Q. I have.

"Q. Under the original bill, did you, on behalf

"of complainant, make a motion to have a Re-
"ceiver appointed?

"A. I did.

"Q. And was that motion denied by the Court?

"A. That motion was denied by the Court on "the ground that the Penn Plate Glass Co. was "solvent, and that it would be an unwarrantable "interference with its business until the final deter-"mination of the case.

"Q. At the time of making the motion, or shortly "thereafter, did you say anything in the presence "of the Court, and Mr. Schoyer, representing the "defendants, and the Penn Plate Glass Co., relat-"ing to insurance on the property?

"A. According to my recollection, I received no-"tice from Judge Buffington that he had concluded "to deny the appointment of a Receiver. According "to my recollection it was the following day I went "into Court. Mr. Schoyer was there and Mr. Kann "was there, and I said to the Court that in consider-"ation of the motion for a Receiver, it occurred to me "that the Court had not considered the fact that this "property was without insurance, and that there was "danger of fire, that my client was a trustee without "funds and that that was a matter that ought to be "considered, and that we were entitled to insur-"ance. The other side denied that they were bound "to insure under the terms of the mortgage. I in-"sisted we should have insurance, they denying that "we were entitled to insurance under the mortgage, "and under the circumstances, Judge Buffington "said: 'I can't decide that question,' and intimated "to them that if they were bound to insure they "ought to protect us, and they denied they were "bound to insure, and the paper signed by Mr. Kann

"and Mr. Wertheimer was given to us in pursuance "of my demand for insurance, and filed in Court and "it is on file to-day.

"Q. So that this bond was filed because you "were insisting on insurance on behalf of the com- "plainant?

"A. Yes, sir.

"Q. And when you say the other side denied "their liability to insure, you mean the Penn Plate "Glass Co. and W. L. Kann?

"A. Yes, sir; those are the parties I mean; and "they did file it.

"Q. They gave what?

"A. A bond signed by Wertheimer and Kann.

"Q. That is the bond that has already been given "in evidence in this case?

"A. Yes, sir.

Supplemental Record pp. 92 and 93.

Conclusions from Foregoing Evidence.

We, therefore, have it established by complainant's own averments and the undisputed admissions of the answers and the testimony of complainant's own counsel.

(a) That long prior to the filing of the original bill in July, 1896, both Kann and the Penn Plate Glass Company gave complainant repeated, distinct and written notices that they had not and would not in the future insure for the benefit of the bondholders.

(b) These notices were in answer to repeated demands made by complainant extending through the ownership of Kann and the Penn Company.

(c) That in 1896, two years after Kann purchased and one year after the sale to the Penn Plate Glass Company, complainant asked for a receiver because the Penn Company had refused to insure for the benefit of bondholders, and there was danger of fire and no existing insurance for the benefit of bondholders.

(d) That the Penn Company in open Court at this time and in the face of this application, refused to insure for the benefit of the trustee then or in the future.

(e) That complainant thereupon acquiesced in this refusal and in open Court accepted the personal bond or guarantee of Kann and Wertheimer that they would be personally responsible if the Penn Company would not set aside, out of policies which they had already taken out for its own benefit, an amount sufficient to make good any loss by fire to the valid bonds secured by the mortgage, provided that the Penn Plate Glass Company was bound to insure for the benefit of the trustee at all; the policies out of which payment was to be made same policies which had been taken out previously by being, according to complainant's own averment, the the Penn Company and on which complainant now seeks an equitable lien.

(f) That the trustee permitted matters to remain in *statu quo* for more than two years from this time until the occurrence of the fire in April, 1898, relying upon

the individual bond which only became effective as a personal liability against Kann and Wertheimer in the event of a judicial determination that the Penn Company was liable to insure.

From this evidence the conclusion is irresistible:

That the trustee from the time of the purchase by Kann in July, 1894, through the time of the ownership of the property by the Penn Plate Glass Company up to the fire, at all times knew that there was no insurance for the benefit of the trustee; and that prior to the filing of the original bill in July, 1896, the Penn Plate Glass Company had taken out insurance which was in existence at that time, and that this insurance was for its own benefit and not for the benefit of the trustee.

The evidence which has been cited is the only evidence in the case on these points, and therefore counsel for respondents submit that they have demonstrated that the court below is in error in finding:

(a) That the insurance in question was effected after the application for the receiver or under stress of that application.

(b) That the trustee was ignorant of the fact that the insurance previously taken out by the Penn Company was for its own benefit and not for the benefit of the trustee, or that the excluding clause was afterwards

placed in the policies without the knowledge of the trustee.

(c) That the Penn Plate Glass Company at the time of the application for a receiver or any other time, promised to insure for the benefit of the trustee or did insure in pursuance of such promise.

In this connection, counsel wish to call the attention of the Court to the fact that the Court below in its opinion treats the guaranty of Kann and Wertheimer as an agreement of the Penn Plate Glass Company, and upon this idea bases its findings:

1st. That the Penn Plate Glass Company promised at that time to insure for the benefit of the trustee.

2nd. That it did so insure thereafter and that the fund upon which it has impressed a lien was insurance taken out subsequently thereto and in pursuance of the agreement therein contained.

This is absolutely and entirely erroneous.

The Court has not quoted this instrument in full in its opinion. An inspection of that agreement will show:

(a) That it was signed by Kann and Wertheimer as individuals and not by the Penn Plate Glass Company and that it was not an agreement of the Penn Plate Glass Company at all.

(b) That insurance had already been taken out by the Penn Plate Glass Company for its own benefit and this insurance was then in existence.

(c) That Kann and Wertheimer agreed to become personally liable in the event that the Penn Company failed to set aside *out of this existing insurance fund* in case of loss by fire, an amount sufficient to pay all valid outstanding bonds, provided that it should be judicially determined that the Penn Company was bound to insure for the benefit of the trustee.

This bond was accepted by the trustee.

Counsel, therefore, contend that the Court never had this fund in its grasp, and the remedy of the trustee, if any, is a personal action against Kann and Wertheimer for a breach of their agreement. Counsel inserts in this place, for the inspection of the Court, a full copy of said agreement, which is as follows:

"We, the undersigned, Emanuel Wertheimer and "W. L. Kann, of Allegheny City, Pennsylvania, "jointly and severally covenant to and with the "Farmers' Loan & Trust Company, of New York, "Trustee named in a certain mortgage of the Penn-"sylvania Plate Glass Company, dated the first day "of January, 1891, and recorded in the Recorder's "Office of Westmoreland County, Pennsylvania, in "Mortgage Book Vol. ....., page ..... That "in the event of a loss by fire of the property de-

"scribed in the said Pennsylvania Plate Glass Com-
"pany mortgage, that then there shall be paid out
"to the said Farmers' Loan & Trust Company, trus-
"tee, in trust for the holders of valid bonds secured
"by the said mortgage, a sum equal to the total
"amount of such valid bonds, out of policies of in-
"surance existing in favor of the Penn Plate Glass
"Company.

"Provided, that it shall have been finally adjudi-
"cated that the Penn Plate Glass Company, the
"present owner of the said property, is bound or
"liable by anything contained in the said mortgage,
"or the terms of its purchase of the described mort-
"gaged premises, to keep and maintain insurance for
"the benefit of the holders of bonds secured by the
"said mortgage.

"And it is provided further that in the event of a
"loss by fire, and the insurance money payable in
"that event is applied to the restoration of the plant
"of the Penn Plate Glass Company, bound by the
"said mortgage, that then this obligation shall be
"null and void, without prejudice to the right of the
"Penn Plate Glass Company, its successors and as-
"signs, to deny its liability to take out, keep and
"maintain policies of insurance on the said plant, at
"any time for the benefit of the holders of valid
"bonds secured by the said mortgage, or for the
"trustee of said mortgage. And it is further dis-
"tinctly understood and agreed that in the event of
"partial losses and partial restorations the amount

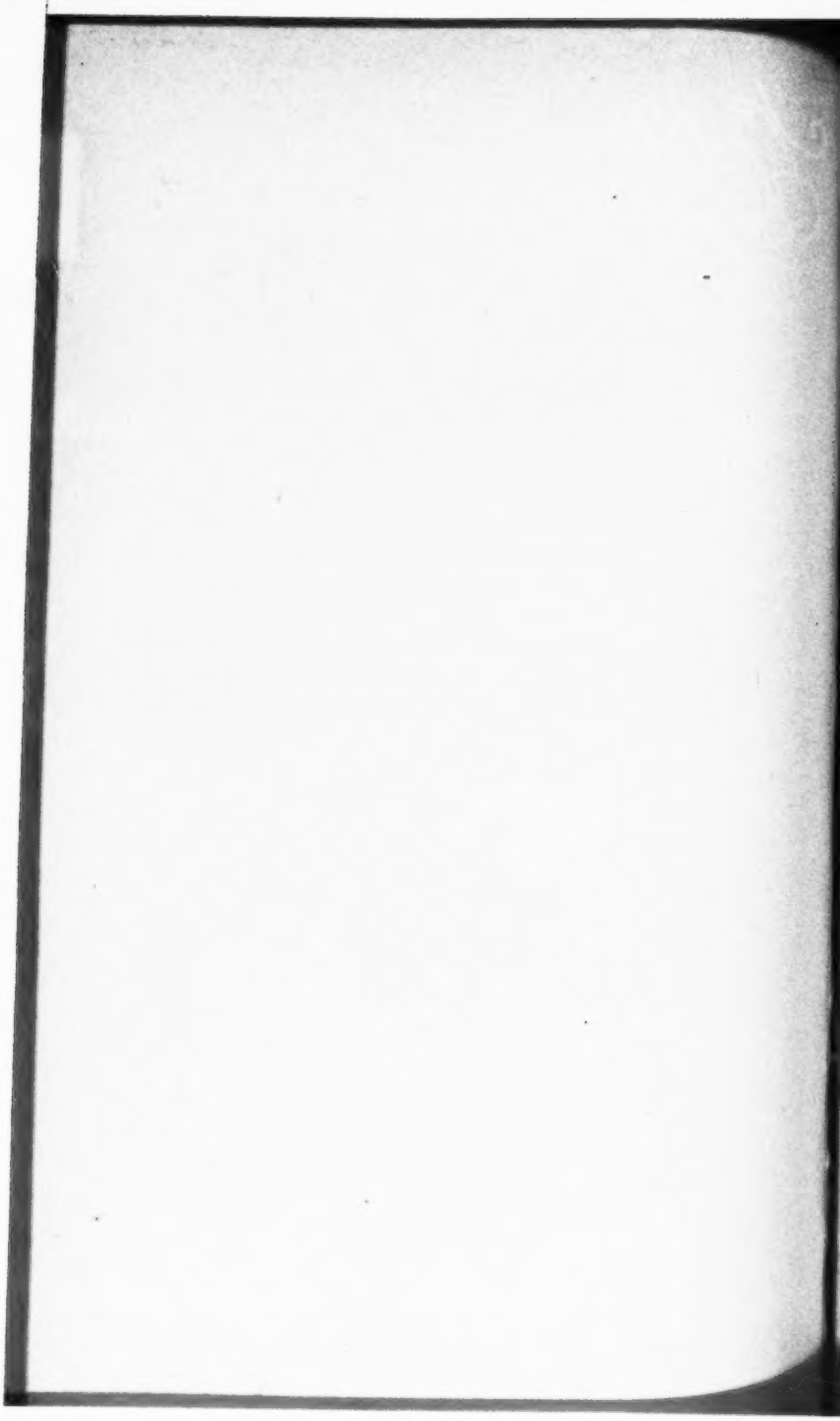
"of the insurance money applied thereto, shall be a "credit on the amount for which we have become "bound by this obligation.

(Signed)

"EMANUEL WERTHEIMER. (Seal.)
"W. L. KANN." (Seal.)

Therefore, if it be decided that the Penn Company was under no legal obligation to insure for the benefit of the mortgage, the bond holders and the trustee had no one to blame but themselves for any loss which may be sustained; as they saw fit, after full notice, to take the chance of the legal question being decided in their favor.

S. SCHOYER, JR.,
BERNARD CARTER,
S. B. SCHOYER,
For Appellees.



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JAMES H. McKENNEY,

No. 180.

Brf. of Marshall for

Supreme Court of the United States,

OCTOBER TERM, 1901.

Filed April 23, 1902

No. 180.

THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE, PETITIONER,

vs.

THE PENN PLATE GLASS COMPANY and WILLIAM L. KANN.

On Writ of Certiorari to the United States Circuit Court of Appeals.

BRIEF FOR APPELLEES.

LOUIS MARSHALL,
Of Counsel.

APPEAL PRINTING CO., 14-16 Vesey Street, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1901.

THE FARMERS' LOAN AND TRUST COMPANY, Trustee, Petitioner, vs. THE PENN PLATE GLASS COMPANY and William L. Kann.	No. 180.

Brief for Appellees.

The brief already filed on behalf of the appellees so fully treats of the questions involved, that but little need be added to what has already been said, except by way of supplemental authority and of restatement.

POINTS.

I.

The mortgage of the Pennsylvania Plate Glass Company to the petitioner contains no covenant on the part of the mortgagor to insure the mortgaged premises.

(*a*) The mortgage contains no express covenant

or stipulation on the part of the mortgagor to insure for the benefit of the mortgagee and bondholders, unless such covenant is contained in the tenth article.

(*b*) A covenant on the part of the mortgagor to insure will not be implied.

Columbian Ins. Co. v. Lawrence, 10 *Peters*, 507.
Carpenter v. Providence Ins. Co., 16 *Peters*, 495.

(*c*) The tenth article of the mortgage refers to the relation between the trustee and its *cestuis que* trust—the bondholders—and not to the relation existing between the mortgagor and the trustee.

This is evident from an examination of each of the five paragraphs of which this article consists.

(1) The first of these paragraphs declares that the right of action under the mortgage is vested exclusively in the trustee, and specifies the single instance in which the bondholders may sue. It absolves the trustee from the obligation of suing or of taking any proceedings under the indenture until indemnified for all possible expenses, disbursements and damages to its satisfaction, reserving to it the right, however, of beginning suit or of doing anything else in its judgment proper to be done without such indemnity, in which event compensation out of the trust fund is provided for.

(2) The second paragraph absolves the trustee from the obligation of recognizing any person as holder of any of the bonds secured under the mortgage, or to do or refrain from doing any act pursuant to the request or demand of any person, until

such supposed holder or owner shall produce his bonds and deposit them with the trustee.

(3) The fourth paragraph declares that whenever it is necessary or proper for the trustee to make any investigation preparatory to taking or not taking any action, or of doing or not doing any thing, as trustee, the certificate of the mortgagor, under its corporate seal, attested by the certificate of its president, or the affidavits of one or more directors, shall be conclusive evidence of such fact, to protect the trustee in any action that it may take by reason of the supposed existence of such fact.

(4) The last paragraph of the article discharges the trustee from responsibility as to the correctness of any recital, statement of fact or representation made in the mortgage by the mortgagor, and further declares that it is not to be understood as making any representations as to the character, extent or value of the mortgaged property, or as to the title thereto.

(5) The third paragraph, on which the petitioner rests its argument, clearly purports to regulate or qualify the obligation of the trustee to the beneficiaries of the trust, and does not assume to contain any stipulation or covenant from the mortgagor to the mortgagee:

"It shall be no part of the duty (of the trustee) to file or record this indenture as a mortgage or conveyance of real estate, or as a chattel mortgage or to renew such mortgage, or to procure any further, other or additional instrument or further assurance, or to do any other act which may be suitable and proper to be done for the continuance of the lien hereof or for giving notice of the existence of such lien, or for extending or supplementing the same."

Each of these acts refers to a duty which, but for this provision, might properly be claimed was owing from the trustee to its beneficiaries. It was immaterial to the mortgagor as to whether the mortgage should be filed or recorded, or whether it should be renewed, or whether or not additional instruments or further assurances should be executed, or any act done to perpetuate the lien or extend or supplement it, or to give or withhold notice of its existence. These acts all related to the protection of the bondholders and their trustee was speaking to them and not to the mortgagor, the latter occupying a position of positive indifferene so far as they were concerned.

Then follows the further clause in the same paragraph, separated only by a semi-colon from the provisions which have just been read.

"Nor shall it be any part of its duty to effect insurance against fire or other damage on any portion of the mortgaged property; or to renew any policies of insurance; or to keep itself informed or advised as to the payment of any taxes or assessments, or to require such payments to be made."

Here, in like manner, the trustee is dealing with the bondholders and is stipulating for exemption from liability in the event that it shall fail to effect insurance, to renew policies, to keep itself informed or advised as to the payment of taxes or assessments, or as to requiring payment therefor to be made.

Then in the same sentence, and in connection with the antecedent clauses which have just been quoted and which clearly relate to a stipulation between the trustee and the bondholders, come the words "*but* the *trusteee* may in its discretion *do* "any or all the matters and things in this "paragraph set forth, or require the same to be "done."

It is not stated who may be required in the trustee's discretion to do these matters or things. The mortgagor does not declare that it will do them. The permission granted to the trustee is not a covenant on the mortgagor's part. "The matters and things in this paragraph set forth" are not of such a character as would lead it to be selected for doing them, or impose upon it any obligation with respect thereto, or to lead it to be considered as the proper party to perform them. Thus, for illustration, who would ever contemplate the selection of the mortgagor as the proper party to file or record the mortgage, or to initiate proceedings for the procurement of further assurance?

The rule *noscitur a sociis* and the principle of construing words *ejusdem generis*, sustain the contention that the clause now under consideration does not embody a covenant on the part of a mortgagor.

This is likewise a case for the application of the rule, that when general words occur at the end of a clause or sentence they refer to and qualify the whole. Read in the light of these causes of interpretation, it is difficult to invest a covenant on the part of the mortgagor, from these unwilling words.

Dwaris on Statutes, 704.
2 Institutes, 50.
Gyger's Estate, 65 Pa. St. 311.
Eby's Appeal, 70 Pa. St. 311.
Fisher v. Connard, 100 Pa. St. 63.
United States v. Babbitt, 1 Black, 55.
Great Western Ry. Co. v. Swindon Ry. Co., L. R. 9 App. Cases, 787.
Corson v. Dolan, 2 Daly, 66.

The absence of the intent of imposing a covenant

with respect to insurance on the mortgagor, is further evidenced by the words immediately following:

"It (the trustee) shall only be responsible for reasonable diligence in the performance of the trust and shall not be answerable in any case for the act or default of any agent, attorney or employee selected with reasonable discretion."

Here, again, the instrument gives expression to the paramount idea that the trustee is stipulating with the bondholders for immunity and is not concerning itself with the mortgagor; nor is the latter in anywise interested or concerned in the numerous stipulations contained in the tenth article which bear upon the relations between the trustee and the bondholders.

(*d*) The implication of a covenant on the part of the mortgagor from language bearing upon the relations between the trustee and the bondholders would be most extraodinary.

The draftsman of this instrument understood the nature of a covenant, and if it had been intended to impose upon the mortgagor the duty of insuring the property for the benefit of the mortgagee it would have been both simple and natural to have imposed such obligation in unambiguous language, with ample provisions as to the extent of insurance, with a specification that the insurance should be taken out for the benefit of the mortgagee, and with the usual provisions contained in covenants to insure.

The omission of such a provision when coupled with the language of the fourth article, which exempted the mortgagor from personal liability for the indebtedness secured by the mortgage, and the manifest intention that the mortgaged property

should be the sole security of the bondholders and of the mortgagee, indicates that the implication of a covenant from the language relied upon would do violence to the intention of the parties.

The clause from which the covenant is sought to be deduced begins with the disjunctive "but" which creates a proviso or condition, but not a covenant.

As was said by Mr. Justice Harlan in *Hale v. Finch*, *104 U. S., 261, 269*, where it was intended to charge defendant with a covenant not to use a certain steamboat within ten years on certain routes of travel and to hold him responsible for the breach of such implied covenant:

"But according to the authorities, including some of those above cited, and from the reason and sense of the thing, *a covenant will not arise unless it can be collected from the whole instrument that there was an agreement or promise, or engagement upon the part of the person sought to be charged, for the performance or non-performance of some act* * * * There is, in terms, a covenant by Hale to Finch to defend the title to the boat and its machinery against all persons whomsoever. This is immediately followed by language implying an agreement that the sale was upon an express condition that neither the boat nor its machinery should be used within a prescribed time upon certain waters. It is the case of a bare, naked condition, unaccompanied by words implying an agreement, engagement or promise by the vendee that he would personally perform, or become personally responsible for its performance."

Moreover, if it had been intended to impose any further covenants upon the mortgagor it would have been but natural that such covenants would have been inserted in article sixth, which contains the only formal covenant assumed by the mortgagor. That, however, is merely a covenant of

further assurance and, under the circumstances, the omission of any other covenant affords a strong ground for the application of the maxim *expressio unius exclusio alterius.*

This branch of the case has been so elaborately and ably considered in the opinion of Judge Gray in the Circuit Court of Appeals (*103 Fed. Rep., 132*) that further discussion seems unnecesary.

If his views on this proposition are adopted we can rest the argument here, since it would necessarily follow that if the mortgagor was under no obligation to insure for the benefit of the mortgagee, subsequent grantees would certainly not rest under such a duty.

II.

But assuming that the tenth article of the mortgage can be tortured into a covenant on the part of the mortgagor to insure, such covenant was personal in its nature, did not run with the land, and, therefore, conferred no right in the mortgagee to the proceeds of the insurance policies taken out by the appellees.

(*a*) It may be useful to first consider the nature of a contract of insurance procured by the owner of the equity of redemption of mortgaged property, in order to show that the proceeds of such a policy do not represent the property, and, in the absence of special covenant, do not inure to the benefit of the mortgagee.

In *Carter v. Rockell, 8 Paige, 436*, it was decided that where the owner of mortgaged premises

insures them for his own benefit and the premises are destroyed by fire, the mortgagee is not entitled to the money payable by the insurers on account of such loss, although the insured was personally liable for the debt secured by the mortgage.

In *Columbian Ins. Co., v. Lawrence, 10 Peters, 501, 512*, the Court said:

"We know of no principal of law or of equity by which a mortgagee has a right to claim the benefit of a policy, underwritten for the mortgagor, on the mortgaged premises in case of a loss by fire; it is not attached or an incident to the mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor."

In *Carpenter v. Providence Washington Ins. Co., 16 Peters, 495*, this language was quoted with approval by Mr. Justice Story, who further held, that when the insurance is made by the mortgagor he can, notwithstanding the mortgage or incumbrance, insure for and recover the full value of the property, but that the mortgagee, although he has an insurable interest, can only insure the amount of his debt.

In *Gleason v. First National Bank of Lapeer, 13 Fed. Rep., 720*, Judge Brown said:

"We do not dispute plaintiff's contention that a policy of insurance is a personal contract; that a mortgagor and a mortgagee, or other owner and lienholder, have separate insurable interests, and that the right of subrogation does not exist as between them. If the mortgagor insures the mortgaged property in his own name and it is burned, the money belongs to him and not to the mortgagee, though the latter may thereby lose his whole debt."

Nippes' Appeal, 75 Pa. St., 478, a husband made a voluntary conveyance of land to his wife,

subject to the lien of a mortgage, procured the property to be insured for his benefit and thereupon his creditors after the occurrence of a fire sought to reach the insurance money claiming that the transfer was fraudulent and that the money collected on the policy represented the insured property. Mr. Justice Sharswood, however, said:

"But apart from all this, what did the fund in Court represent? Not the property insured, whether real or personal, but the insurable interest of Mrs. Nippes in that property. If she had no insurable interest the policy was void—but that was a question exclusively between her and the insurers. They paid the money into Court at her suit. What title did her husband's creditors show to any part of it? How was the insurance, admitting it to have been effected by the husband, with his own money, any fraud upon them unless to the extent of the premiums? We have no evidence indeed that these premiums were paid with the husband's money, but the wife being the owner of the farm, residing upon and being entitled to its produce, the presumption is that the money with which the insurance was effected was her own. Had the property been destroyed by fire without insurance where would the creditors have been? It is plain the insurance made them no worse. Policies of insurance against fire are not deemed in their nature incidents to the property insured, but they are mere special agreements with the person insuring against such loss or damage as they may sustain, and not the loss or damage that any other person having an interest as grantee, mortgagee, creditor or otherwise, may sustain by reason of the subsequent destruction by fire. (Carpenter v. Providence Washington Insurance Co., 16 Peters, 495). If creditors have a lien by mortgage, judgment or execution, they can insure their own interest, but they can have no right to attach insurance money due to any one but their own debtor."

In *Lerow v. Wilmarth, 9 Allen, 382*, it was held that one who has received personal property by a conveyance which is fraudulent as against creditors, has nevertheless an insurable interest therein, and in case of loss by fire is entitled to hold the money received upon such insurance against the creditors. Chief Justice Bigelow said:

"The rights of creditors were not interfered with or impaired by the insurance effected upon the property for her (the grantee's) benefit. It was a valid contract which she had a right to make and the benefit which accrued to her from it could not be defeated by other persons upon the ground that she held the property by title which in a certain contingency might be defeasible. It cannot be said that the money received on the policy stands in the place of the property destroyed. It is in no proper or just sense the proceeds of the property. It is a sum paid by the insurer in consideration of a certain premium as an indemnity for the loss of property in which the person insured has a legal and insurable interest."

To the same effect is *Loos v. Wilkinson, 113 N. Y., 500.*

(*b*) It being thus clear that the proceeds of a policy of insurance do not represent the mortgaged property, and in the absence of a specific agreement on the part of the owner of the mortgaged premises do not inure to the benefit of the mortgagee, it becomes important to consider whether the appellees, who procured the insurance in the present case, became bound by any contract, to which they were parties or privies, to procure insurance for the benefit of the petitioner.

1. That they did not intend to do so is demonstrated by the language of the policies procured by them, which expressly excluded the interest of the bondholders by the following clause:

"This property is subject to a mortgage of $250,000, but it is distinctly understood that this insurance does not cover the interest of the bondholders."

No language could more clearly disclaim the right of the mortgagee to any interest under these policies; and yet it is claimed on behalf of the petitioner that on some theory of implied contract, based upon rules of natural justice, equity will impute an intention to the appellees to do that which their express language negatived. Such an implication will not be indulged.

In the language of Mr. Justice Clifford in *Hawkins v. United States, 96 U. S., 697*:

"Implied promises or promises in law exist only when there is no express promise between the parties—*expressum facit cessare tacitum*. Hence, says Chitty, a party cannot be bound by an implied promise when he has made an express contract as to the same subject matter; which is certainly sound law, unless the express contract has been rescinded or abandoned. *Chitty Contracts (10th Ed.) 62.*"

2. Not only did the appellees express their intention that this insurance should not inure to the benefit of the mortgagee, by the express terms of the contract of insurance, but when called upon by the petitioner to procure policies of insurance for its benefit they disavowed any obligation to procure it, and gave the petitioner ample opportunity to procure such insurance for its own benefit, in the exercise of its undoubted right.

Insurance Co. v. Stinson, 103 U. S., 25.
1 *Jones on Mortgages*, §397.

3. There being thus no contract between the petitioner and the appellees by which the latter

undertook to procure insurance for the benefit of the former, the only question that remains to be considered in this connection is whether, on the assumption that the mortgagor was bound by a covenant to insure, such covenant was binding on the appellees as subsequent grantees of the mortgaged premises.

A re-examination of this alleged covenant may be useful for the purpose of determining its character and extent.

As has already been said it is not in terms a covenant on the part of the mortgagor to procure any insurance. Still supposing that a covenant is to be spelled out from the language employed, what does the mortgagor, covenant to do? Not to effect insurance for any particular amount; nor that the insurance shall be for the benefit of the mortgagee. All that is said on that subject is, that "it shall be no part of the duty of the mortgagee to effect insurance against fire, etc., but it may in its discretion do any or all of the matters and things in this paragraph set forth, or require the same to be done."

4. The covenant sought to be inferred would be satisfied by insurance effected for the benefit of the mortgagor.

In *1, Jones on Mortgages (5th Ed.), §401,* that learned author, citing *Lees v. Whiteley, L. R. 2 Eq., 143.* says:

"It has even been held that a mere convenant by the mortgagor to effect insurance, without any stipulation that is for the benefit of the mortgagee or that the loss shall be paid to him, does not imply that the mortgagor shall apply the insurance money either in discharge of the mortgage debt or in restoration of the property. A covenant to effect insurance is not without meaning, to

without advantage to the mortgagee, although it be not either expressly or impliedly made for his benefit."

5. But proceeding even further with our assumption, and treating the alleged covenant as one to insure for the benefit of the mortgagee, it is nevertheless insisted that that covenant is a personal covenant which does not bind subsequent owners of the property, because it is not a covenant running with the land.

In *Dunlop v. Avery, 89 N. Y. 592*, Judge Miller said :

"Nor is there any force in the position that the covenant to insure runs with the land, and hence no assignment was required of the policy * * * The covenant in question is entirely personal in its character, does not affect the land or run with it, and is collateral and incidental to the remaining covenants in the mortgage. A conveyance of the land by the mortgagor would not, we think, render the vendee liable on the covenant. See *Platt on Covenants, 183; Platt on Leases, 226 228; Newman v. Wells, 17 Wend, 150.*

In *Reid v. McCrum. 91 N. Y., 412*, the same doctrine was announced after a careful re-examination of the authorities; and it is also recognized by the text writers.

1 Jones on Mortgages (5th Ed.) § 400.
2 May on Insurance, §452.
1 Biddle on Insurance, §254.

6. Even if this were a covenant running with the land, the remedy of the petitioner for a breach of such covenant on the part of the appellees would not be to reach the proceeds of the insurance policies, which upon their very face evidenced an intention that they should not inure to the

benefit of the mortgagee, but the measure of the petitioner's recovery for such breach would have been limited to the cost of such insurance as the mortgagee might have effected for its benefit.

7. The rule amended in *Stearns v. Quincy Mutual Fire Insurance Company*, *124 Mass., 61, 64*, likewise debars the petitioner from the benefit of this insurance.

The petitioner, ignoring the contentions, seeks to deduce an argument from the fact that the conveyances to the appellees were made "subject" to the petitioner's mortgage, and the assumption that such mortgage contained a covenant to insure for its benefit. That argument will now be dealt with.

III.

The conveyance to the Penn Plate Glass Company did not impose upon it any duty in favor of the mortgagor to insure the buildings for the indemnification of the mortgagee, and hence no equities can be deduced from such conveyance in support of its mortgagee's contention.

The petitioner's argument under this head is based entirely on the fact that the conveyance from William L. Kann to the appellee was "*subject to the mortgage*" executed by the Pennsylvania Plate Glass Company to the petitioner. It is claimed that the acceptance of this deed created an obligation on the part of the appellee to the Pennsylvania Plate Glass Company for its indemnification which is enforcible by the pe-

titioner directly against the appellee in order to avoid circuity of action.

Without at this time considering the soundness of the proposition, it is important preliminarily to call attention to a number of essential facts which have been ignored in the petitioner's argument.

(*a*) After the execution of the mortgage in controversy a suit in equity was brought in the Court of Common Pleas of Westmoreland County, Pennsylvania, for a decree of insolvency, the dissolution of the corporation, and the appointment of a receiver. In that suit Joseph W. Stoner was appointed such receiver and all of the property of the corporation was turned over to him for administration under the direction of the Court, and pursuant to the decree rendered in the action he became vested with the property which was described in the mortgage, as the successor of the Pennsylvania Plate Glass Company.

(*b*) Pursuant to a decree rendered in the cause in which Stoner was thus appointed receiver, he was directed to sell the property covered by such mortgage "subject to the lien of the first mortgage "of Two hundred and fifty thousand dollars to "secure the payment of bonds; which said mort-"gage was recorded in Westmoreland County in "Mortgage Book 43, page 1."

(*c*) Stoner, as Receiver, exposed for sale at public auction the plant of the Pennsylvania Plate Glass Company on June 18th, 1894, in pursuance of the decree, and it was sold to William L. Kann "subject to the lien of the first mortgage of two "hundred and fifty thousand dollars with interest "thereon"; and the conveyance executed by the receiver recited that the conveyance was accepted by the grantee "subject to the mortgage."

(*d*) On July 1st, 1895, William L. Kann and wife conveyed to the Penn Plate Glass Company the same property, "subject to the mortgage," and it is on this conveyance that the petitioner grounds it argument.

(*e*) The Pennsylvania Plate Glass Company at the time of the rendition of the decree against it was hopelessly insolvent. All of its property and assets have been disposed of and distributed. It has never paid to the petitioner any sum whatsoever on account of the principal secured by the mortgage, or under any of the covenants therein contained. The petitioner, although notified that the appellees declined to effect insurance in its behalf, did not insure, and hence has no claim against the mortgagee for premiums. The latter has ceased to exist for all practical purposes and is not in a position to respond to any claim, judgment or decree that may be rendered against it, as it has been stripped of every remnant of its property (Rec., pp. 469-471; *Cowen v Pennsylvania Plate Glass Co., 184 Pa. St., p. ; s. c., 38 Atl. Rep., 1075*).

(*f*) Article Fourth of the mortgage in suit contains the following provision:

"It being expressly understood by and between the parties hereto and by and between the said party of the first part and the respective holders of the said several bonds, collectively, that no other suit or proceeding for the collection of any part of the principal or interest represented by the said bonds and coupons, shall ever be commenced or prosecuted, either against the party of the first part or any of its officers, directors or shareholders, either by the said holders of the said bonds or coupons, or any of them, or by any person or corporation to whom the same or any of them may be assigned or trans-

ferred, except such suits or proceedings as shall be necessary to recover the possession of the said premises hereby conveyed or to subject the same to the payment of the said debts, and that the sale of the said mortgaged premises, whether under the power of the sale hereby granted, or any other power of sale, or by or under any judicial proceedings whatsoever, shall operate as a full and complete satisfaction and discharge of the indebtedness of the said party of the first part, upon the said bonds and the coupons accompanying the same, and of the obligation of the covenants herein contained, whether the said premises shall be bidden in for the whole amount of the said indebtedness or for a less price, anything in the said bonds and coupons or therein contained, to the contrary thereof notwithstanding."

(*g*) The bonds secured by this mortgage provide that they are "equally secured by a certain deed "of trust or mortgage, bearing even date herewith, "conveying the property and franchises of the "company, more particularly described therein, "unto the Farmer's Loan and Trust Company, "*to which reference is hereby made for the terms* "*and conditions upon which this bond is issued* "*and for the rights and remedies of the holder* "*hereof.*"

From these facts it is clear:

(1) That the remedies of the bondholders and of the mortgagee were confined to the property mortgaged, and that no personal liability for the indebtedness secured by the mortgage was imposed on the mortgagor, its officers, directors or shareholders;

(2) That neither of the appellees assumed the payment of the mortgage or accepted a conveyance *subject to the payment of the mortgage*, nor

did they by any similar language indicate the purpose or intent of undertaking any personal liability therefor;

(3) That there was no direct conveyance from the Pennsylvania Plate Glass Company to Kann, or to the appellee their immediate grantor being Stoner as receiver. In the intermediate link of title—the decree of insolvency pursuant to which Stoner was appointed receiver—there was no provision by which the receiver, or the Court, accepted title to the mortgaged property "subject to the mortgage."

I. There having been no assumption of the payment of the mortgage by the appellees, or the acceptance by them of a conveyance subject to the payment of the mortgage, they did not become chargeable with the obligations or covenants, if any, imposed upon the mortgagor by the terms thereof.

The rule, as laid down in numerous cases, is well expressed in *1 Jones on Mortgages (5th Ed. §738*, as follows:

"If the purchaser buys a mere equity of redemption, he is not personally liable for the mortgage debt; or liable either legally or equitably to indemnify his grantor against the mortgage. He may give up the property at any time in satisfaction of the lien. The mortgage debt remains an incumbrance upon the estate, and a debt of the mortgagor, but not a debt of the person buying. In the absence of a special agreement to assume the mortgage or words in the grant importing in some form that he assumes the payment of it, the purchaser is not personally liable for it."

In *§748* the author says:

"A deed which is merely made subject to a mortgage specified does not alone render the grantee

personally liable for the mortgage debt. To create such liability there must be such words as will clearly import that the grantee assumed the obligation of paying the debt."

From among many cases which may be cited in support of this proposition the following are selected:

Shepard v. May, *115 U. S.*, *505*.
Elliott v. Sackett, *108 U. S.*, *132*.
Fiske a. Tolman, *124 Mass.*, *254*.
Belmont v. Coman, *22 N. Y.*, *438*.
Hoy v. Bramhall, *19 N. J. Eq.*, *74*.
Chilton v. Brooks, *71 Md.*, *45*.
Dean v. Walker, *107 Ill.*, *540*.
Smith v. Truslow, *84 N. Y.*, *660*.

In *Elliott v. Sackett*, *108 U. S.*, *140*, Mr. Justice Blatchford said:

"An agreement merely to take land subject to a specified incumbrance is not an agreement to assume and pay the incumbrance. The grantee of an equity of redemption without words in the grant importing in some form that he assumes the payment of a mortgage, does not bind himself personally to pay the debt. There must be words importing that he will pay the debt, to make him personally liable. The language of the agreement in the present case does not amount to such an undertaking on the part of Elliott. It is only a statement that the conveyance is to be subject to the incumbrance, and creates no personal liability in the grantee."

In *Shepherd v. May*, *115 U. S.*, *505*, Mr. Justice Woods said:

"We have under this assignment of error to decide whether, by the mere conveyance of the premises in question to Walker by Shepherd, subject to the encumbrance created by the deed of trust, Walker became bound to May as principal debtor,

and Shepherd became his surety. We are of opinion that the conveyance of the premises to Walker did not subject him to any liability to May whatever. To raise such a liability, as is contended for by Shepherd, there must be words in the deed of conveyance from which, by fair import, an agreement to pay the debt can be inferred."

In *Keller v. Ashford, 133 U. S. 610*, the deed contained express words of assumption, the language being "subject, however, to certain incumbrances now resting thereon, payment of which is assumed by the grantee." Yet it was held that such an agreement was a contract between the grantee and the mortgagor only, and did not, unless assented to by the mortgagee, create any obligation from the grantee to the mortgagee.

The opinion of Mr. Justice Gray recognized the doctrine of *Elliott v. Sackett* and *Shepherd v. May*, and adopted the *ratio decidendi* of *Crowell v. St. Barnabas Hospital, 12 C. E Green, 650*, to the case then under consideration, which, as has been seen, was one of express assumption by the grantee of the payment of the mortgage:

"But the right of the mortgagee to this remedy does not result from any fixed or vested right in him, arising either from the acceptance by the subsequent purchaser of the conveyance of the mortgaged premises or from the obligation of the grantee to pay the mortgage debt as between himself and his grantor. Though the assumption of the mortgage debt by the subsequent purchaser is absolute and unqualified in the deed of conveyance, it will be controlled by a collateral contract made between him and his grantor, which is not embodied in the deed. And it will not in any case be available to the mortgagee, *unless the grantor was himself personally liable for the payment of the mortgage debt.*

"Recovery of the deficiency after sale of the mortgaged premises, against a subsequent pur-

chaser, is adjudged in a court of equity to a mortgagee not in virtue of any original equity residing in him. He is allowed, by a mere rule of procedure, to go directly as a creditor against the person ultimately liable, in order to avoid circuity of action and save the mortgagor, as the intermediate party, from being harassed for the payment of the debt and then driven to seek relief over against the person who has indemnified him, and upon him the liability will ultimately fall. The equity on which his relief depends is the right of the mortgagor against his vendee, to which he is permitted to succeed by substituting himself in the place of the mortgagor."

In the present case this reasoning does not apply.

(1) Because there was no assumption of payment of the mortgage by the grantees;

(2) Because the mortgagor was not personally liable for the payment of the mortgage debt;

(3) Because, under the circumstances (the mortgagor could not have been damnified, and, hence there was no occasion to avoid circuity of action.

The rule as announced by the authorities has in Pennsylvania been made even more emphatic by the act of June 12, 1878; (*Brightlys Purdon's Dig. 2930; Pamph. L. p. 205*), as follows:

"Grantees of real estate which is subject to ground rent or bound by mortgage or other encumberance, shall not be personally liable for the payment of such ground rent, mortgage or other encumberance unless he shall by an agreement in writing have expressly assumed a personal liability therefor; or there shall be express words in the deed of conveyance stating that the grant is made on condition of the grantee assuming such personal liability; provided that the use of the words

'under and subject to the payment of such ground rent, mortgage or other encumberance' shall not alone be construed so as to make such grantee personally liable as aforesaid. The right to enforce such personal liability shall not inure to any person other than the person with whom such agreement is made; nor shall such liability continue after the said grantee has parted *bona fide* with such encumbered property, unless he shall have expressly assumed such continued liability."

It is difficult to see how, under the language of this act, reading it in connection with the previous decisions, a deed which is made subject to a mortgage merely can be made the basis of any obligation on the part of the grantee either by way of assumption or indemnity.

(*a*) The possibility of personal liability is absolutely excluded in express terms.

(*b*) Under previous decisions personal liability for a deficiency had resulted where the conveyance was merely made "subject to a mortgage"; hence the proviso contained in the act must have been intended to abolish the theory of liability based on a contract of indemnity.

(*c*) The right to enforce the personal liability created by a contract of express assumption, was limited to the person with whom such contract was made. How then can it be argued that the lesser contract of indemnity would inure to any person other than the one with whom such contract of indemnity was made.

Here, no agreement was made between the petitioner and the appellees; nor was there any agreement made between the Pennsylvania Plate Glass Company and either of the appellees. The conveyance whereby Kann acquired the property was from Joseph W. Stoner, as receiver of the Penn-

sylvania Plate Glass Company, and the deed under which the Penn Plate Glass Company acquired the property was from Kann.

The case of *Moore's Appeal, 88 Pa. St., 454,* arose before the Act of 1878. In *Blood v. Crew Levick Co., 171 Pa. St., 378,* the conveyance contained an express covenant by the grantee to pay the mortgage debt, the language being "it is "hereby agreed between the parties to this instru- "ment that the said party of the second part ac- "cept the title * * * subject to the payment "of the mortgages herein mentioned." Moreover the action to enforce the covenant was brought by the vender, and not by the mortgagee. Hence the Court held that the Act of 1878 played no part.

But it is difficult to conceive what function that act can perform if, under the theory of a contract of indemnity the same result can be accomplished as would follow from an express contract of assumption. The legislature evidently intended to relieve grantees who took conveyances "subject to mortgages," from any potential liability, in consequence of the acceptance of such a conveyance, and to treat such a clause as merely expressive of the idea that the grantee took his conveyance with notice of an existing paramount lien, and nothing else.

(4) That the mortgagor has not been and cannot be damnified by reason of any claim made against it by the petitioner.

It is difficult to understand how any equities in favor of the petitioner and against the appellee can be deduced from the fact that the conveyance to the latter from Kann, and to him from the receiver of the Pennsylvania Plate Glass Company, was "subject to the mortgage" executed by that corporation to the petitioner.

II. Assuming, but not conceding, that under the decisions in Pennsylvania a conveyance of land "subject to a mortgage" or other incumbrance is a covenant of indemnity for the protection of the vendor only, the record shows that the Pennsylvania Plate Glass Company, treating it as the appellee's vendor, cannot possibly be damnified. Hence no equities can arise under any fancied covenant of idemnity.

(*a*) As has been seen, the bonds secured by the mortgage refer to the latter instrument, whose terms and conditions must be deemed embodied in the bonds, and the rights and remedies of the holder are such only as are conferred by the terms of the mortgage, which exclude the idea of personal liability on the part of the mortgagor.

McClellan v. Norfolk Southern R. R. Co., 110 N. Y., 469.
Batchelder v. Council Grove Water Co., 131 N. Y., 42.

It follows that if the mortgagor cannot be charged with liability for the indebtedness secured by the mortgage, there is nothing for a covenant of idemnity to operate upon. Where there can be no damage or liability, idemnity has no function to perform.

(*b*) Not only is this case destitute of any foundation for the claim of idemnity because of a non-existing liability, but by reason of inability of the mortgagor to respond for liability, even if it existed, the appellee could in no event be called upon to make good a loss which has not been suffered.

This becomes clear from an examination of the authorities.

King v. Whitely, *10 Paige*, *465*, is one of the leading cases on the subject. There it was held that, where a *grantee* of the equity of redemption in mortgaged premises, who was neither legally nor equitably interested in the payment of the bond and mortgage, except so far as the same was a charge on his interest in the premises, conveyed the mortgaged premises "subject to the mortgage," and the conveyance recited that the grantees therein assumed the payment of the mortgage and were to pay off the same as a part of the consideration for such conveyance, since the *grantor* was not personally liable to the holder of the mortgage to pay the same, the grantees were not liable for any deficiency that might arise upon a foreclosure sale of the mortgaged premises.

In *Trotter v. Hughes*, *12 N. Y.*, *74*, this decision was followed and applied, the Court deciding that where the grantor of mortgaged premises is not personally holden for the debt, and the conveyance from him contains covenants of seizin and warranty, and a statement that the premises are subject to the mortgage, the grantee is not personally liable for the mortgage debt or any part of it.

It was further followed in *Garnsey v. Rogers*, *47 N. Y.*, *233*, and *Vrooman v. Turner*, *69 N. Y.*, *280*, in the latter of which cases Judge ALLEN, after carefully reviewing the authorities, said (p. 283):

"The rule which exempts the grantee of mortgaged premises subject to a mortgage, the payment of which is assumed in consideration of the conveyance as between him and his grantor, from liability to the holder of the mortgage when the grantee is not bound in law or equity for the payment of the mortgage, is founded in reason and principle and is not inconsistent with that class of cases in which it has been held that a promise to

one for the benefit of a third party may avail to give an action directly to the latter against the promissor, of which *Lawrence v. Fox* (*20 N. Y., 268*), is a prominent example. To give a third party who may derive a benefit from the performance of the promise, an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally."

To the same effect is *Durnherr v. Rau*, *135 N. Y., 219*.

In *Moore's Appeal*, *88 Pa. St., 450*, Chief Justice Sharswood, commenting upon the effect of a conveyance "subject to a mortgage," and declaring it to be a covenant of indemnity only, said:

"Why should a covenant be inferred from these words by the vendee to the vendor to do more than protects the latter from loss? If there is no existing personal liability in the vendor by reason of his bond or promise under which he can be compelled to pay if the mortgaged premises prove insufficient, what reason is there that he should exact a covenant from his vendee for the benefit of a stranger? If such personal liability does exist why should he exact anything more than indemnity? Surely then something should appear to create the inference of such a covenant. The words 'under and subject' import no such thing. They import that the vendee takes the land encumbered, and at most that so taking it, at an agreed consideration, which includes the incumbrance, he will indemnify the vendor to the extent of that consideration, in the same manner as if it had been paid in cash and so applied at the time. It is unwise to give an arbitrary, artificial meaning to words commonly used in contracts and conveyances, and thus entrap parties into engagements into which they had no reason to suppose, in the com-

mon use of language, they were entering. The Act of Assembly of June 12, 1878, Pamph. L., 205, has very wisely provided that the grantor shall not be personally liable unless he shall expressly assume such liability by agreement in writing, or condition in the conveyance."

In *Samuel v. Peyton, 88 Pa. St., 465*, it was held that where by an agreement between the first grantee of premises with the original mortgagee, said grantee was not to be personally liable on the mortgage, a subsequent grantee is not made so by reason of the "under and subject" clause in the mortgage.

Chief Justice Sharswood, after referring to his opinion in *Moore's Appeal* (*supra*), added:

"It was shown in that case, on a review of the authorities, that it was only where there was an express agreement to pay the encumbrance, or where such agreement might be implied from the circumstance that there was liability to the encumbrancer, or that he could sue in the name of the vendor to his use. The vendor must sue, and must show that he has been damnified, or at least must show that his danger of damnification is imminent. The special pleas in this case not only expressly denied any agreement by the defendant to pay the mortgage, but averred a state of things which showed that the vendor never could be damnified. If it was expressly agreed that the first grantee from the party creating the encumbrance should not be personally liable, it is evident that no subsequent grantee could become so without his own express agreement. The first link in the chain by which a subsequent grantee might be called upon to indemnify his vendor would be wanting."

See also

Girard Life Insurance & Trust Co. v. Stewart, 86 Pa. St., 89.

In *Blood v. Crew Levick Co., 171 Pa. St., 328; s. c. 33 Atl. Rep., 344*, it was held that the vendor of land "under and subject to the lien of" a mortgage has no right of action against the purchaser on account of such stipulation until he has actually paid the mortgage debt, or until the land has been withdrawn from the reach of the holder of the mortgage. Mr. Justice Williams said:

"As to the amount still due and unpaid on the mortgages on the freehold estates, the plaintiff cannot recover to her own use until she has been compelled to make payment, and then only to the extent of the payments actually made. * * * As to the mortgage on the leaseholds, the vendor took no express covenant and must depend upon that which the law implies from the 'under and subject to the lien of' clause. The effect of the implied covenant is to make the land primarily liable for the mortgage debt, the vendor becoming as between the vendee and himself, bound to provide for the payment of the mortgage. The vendee undertakes, on the other hand, that the land shall remain liable to seizure and sale for the payment of the mortgage debt, and that he will do no act which shall tend to withdraw it from the reach of the creditor or prevent the fair application of its full value to the debt * * * The facts contained in the case stated are not as full as might be desired, but they do not show that the plaintiff has been compelled to pay the leasehold mortgage, or any part of it, either in money or by an application of it to the extinguishment of any demand due to the estate of her deceased husband, nor that the land has been withdrawn from the reach of the holder of the mortgage."

The right for which the petitioner contends under the view most favorable to it, must be a derivative right, coming through the mortgagor. If the latter's right never accrued the former's would never spring into existence.

III. The grantor of Kann—the Receiver of the Pennsylvania Plate Glass Company—having acquired the property conveyed by him pursuant to a judicial decree, and being bound by no covenant of indemnity, there is no privity between the petitioner, as mortgagee, and the appellee which, under any circumstances, would bind the latter to the former.

This is most conclusively shown by the language of Chief Justice Sharswood in *Samuel v. Peyton* (*88 Pa. St., 465*), which has already been quoted:

"If it was expressly agreed that the first grantee from the party creating the encumbrance should not be personally liable, it is evident that no subsequent grantee could become so without his own express agreement. The first link in the chain by which a subsequent grantee might be called upon to indemnify his vendor would be wanting."

In other words, the liability of the grantee depends on that of his immediate grantor. If the nexus between the mortgagor and the appellees is broken, the mortgagee cannot successfully bridge the gap. Or as the idea has been elsewhere expressed:

"Since the mortgagee upon this theory proceeds against the grantee not in his own right, but by subrogation to the rights of the grantor, it necessarily follows that if the grantor was not originally liable or if before the action is brought, such liability has ceased to exist, the mortgagee cannot recover against the grantee."

See

Trotter vs. Hughes (*supra*).
King vs. Whitely (*supra*).
Biddle vs. Pugh, *57 N. J. Eq.*, *480*.
Eakin vs. Schultz, *47 Atl. Rep.*, *270*.

IV.

The petitioner while constrained to concede that the appellees are not liable under the terms of their conveyances on any contract of indemnity so far as the mortgage debt is concerned, because the mortgagor was under no covenant to pay such debt, nevertheless asserts that the obligation of imdemnity applies to the alleged covenant to insure. This contention is unsound.

(*a*) The covenant to insure (assuming that such a covenant can be implied) was at most a mere incident to the obligation of the mortgagor, and a collateral agreement. If there was no obligation on the part of the mortgagor to pay the debt which was secured by the mortgage, then it would seem that the incident would fall with the principal. Hence, if there was no enforcible contract of indemnity so far as the principal was concerned, how can it be said that there was such an obligation with respect to the incidental covenant to effect insurance?

(*b*) The covenant to insure being personal in its nature, and not one running with the land, it is difficult to understand how the acceptance of a conveyance "subject to the mortgage" and which did not impose any obligation on the grantee so far as insurance was concerned, can operate as a contract of indemnity with respect thereto.

(*c*) Treating this case as though the Pennsylvania Plate Glass Company had undertaken to enforce the contract of indemnity against the appellees with respect to the covenant to insure, what

would have been the rule of damage? That company could only recover a sum equal to the amount which it could be compelled by the petitioner to pay to it by reason of a breach of the alleged covenant to insure. Inasmuch as the mortgagor was under no covenant to pay the indebtedness, the amount of such indebtedness could not have been the measure of damage.

The value of the mortgaged property would not have been the reasonable, probable or proximate amount of damage resulting from the failure to insure. At the most the amount expended in the procurement of insurance would have been recoverable by the petitioner from the mortgagor.

In *Dodd v. Jones*, *37 Mass.*, *322*, in an action for breach of an agreement to assign a policy of insurance upon a house sold by the defendant to the plaintiff, by reason of which the policy became void, it was held that the measure of damages (the plaintiff having procured no new insurance) is the cost of insurance for the unexpired term of the policy and not the amount of the injury resulting from the subsequent burning of the house. Mr. Justice Allen said:

"The agreement was not a contract of insurance but of sale; and the measure of damages for the breach of it was the value of the thing sold. A sum that would procure a similar policy and thus place the plaintiff in the position she would have been in had there been no breach of the contract, would indemnify her, and she cannot elect to go without insurance and hold the defendant as insurer. Damages resulting from the burning of the building are not the direct and natural consequence of the breach of the defendant's contract, and could not have been contemplated by the parties as included in it. The natural consequence of the failure of the defendant to perform his contract would be that the plaintiff would procure

another policy of insurance, and she cannot charge the defendant with the consequences of her neglect to do that."

In *National Mahaiwe Bank v. Hand, 80 Hun, 584*, the defendant leased from the plaintiff a building for a term of years, with the right to purchase upon compliance wtih the conditions therein named, and the lessee covenanted "to keep in force in insurance on said property for the benefit of said bank (the lessor) in the sum of $10,000, in such companies as said bank shall approve." No policy of fire insurance was issued covering the building and it was subsequently destroyed by fire. It was held, following the case just cited, that the measure of damages was not the amount of insurance stipulated for, but the cost of procuring a policy for that amount.

Indemnification of the mortgagor, therefore, could not have involved the payment to it of any sum in excess of the amount for which it was liable to respond to the mortgagee. The latter having incurred no liability for insurance premiums, the mortgagor incurred no liability to it therefor, and, consequently, there was nothing for which the grantees could be called upon to make indemnity.

(*d*) As has already been shown policies of insurance against fire are not incidents to the property insured and do not represent the property, but are the product of independent contracts with which the mortgagee, unless named in the policy, has no privity. Hence there can be no relation between the fund arising from the contracts between the appelles and the insurance companies, by the terms of which the mortgagee was expressly excluded from beneficial enjoyment, and the alleged contract of indemnity, which, if it ever existed, was expressly discovered by the appellees.

Louis e Marshall.